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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894. No. 304.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

EMMA GRIFFITH.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN K. COWEN,
HUGH L. BOND, JR.,
For Plaintiff in Error.

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Statement of the Case.

At the trial below, Judge Sage stated the case in his charge as follows:

"This action is to recover damages against the Baltimore and Ohio Railroad Company for injuries received on the 1st of August, 1888, at Locust Grove crossing, about four and one-half miles south of Newark, by the collision of a train with the horse and buggy in which the plaintiff was then riding with her mother, who was driving. The accident occurred about 12 o'clock at noon of that day.

"The testimony of the mother is, that between 10 and 11 o'clock she started with her daughter from their home, which is twelve miles from Newark, intending to go to Newark. They were in a phaeton buggy, the top of which was up and the side curtains off, so that the view was unobstructed. When they reached Hog Run bridge, as it is called in the testimony, which is about a quarter of a mile from the crossing, they began, according to her testimony, to watch for the noon train. She states that they were watching for the noon train. They drove very carefully, according to her evidence. There was no sign of the train.

"Passing from the bridge, they went up a little hill. Passing from the bridge, they could see the track and could have seen the train, if it had been there; but they saw no train. Passing on up to the top of the hill, they drove carefully; saw no sign of the train. At the top they stopped and listened, but heard nothing; then drove slowly down the hill. She testifies, that at the top of the hill they were about fifty yards from the crossing; that it was near the train time, or as she expresses it, 'it was very close;' must have been twelve o'clock, she testifies, and that the noon train was due at twelve.

"According to this testimony, gentlemen, the mother knew that the time for the approach of the train was at hand. Then, according to her testimony, they went down the hill slowly. On the right hand side, which was the side from which the train from the south would approach, there was a bank and also a field of growing corn some ten or twelve feet high, which, she states, shut out any view of the train; that by reason of these obstructions they could not see the track nor an approaching train until, as she expressed it in her testimony, they were within a very short distance from the track.

"You will remember the testimony, gentlemen, indicating, perhaps as far as from where I am sitting to that corner of the window (about forty feet.) When the horse

got his two forefeet upon the track, they saw the train coming, as she expresses it, 'like lightning,' within a few yards of them. Her daughter threw up her hands and said: 'Oh, ma!' and that was all that was said. Instantly the horse was struck in the neck and shoulder, and thrown some sixty feet, the phaeton some thirty feet, the daughter underneath, the mother rendered unconscious. * * *

"It is admitted that the daughter would testify that she had no recollection whatever of any of the facts that occurred." (Record, pages 93 and 94.)

"The mother testifies that they heard no whistle; that they were listening for it; and that they heard no bell. Now, upon cross-examination, she testified that from the end of the field of growing corn—that is, from the lower edge of the growing corn—to the track, the distance was about equal to that from one corner of the court room on the other side of the hall to the corner diagonally opposite—I suppose forty or fifty feet; and there is one witness, Mr. Holtzberry, who testifies for the plaintiff (he was sitting in the smoking car as the train approached, and the window of the car where he was sitting was up), that he remembers the approach of the train to that crossing on that day; that there was a whistle just when the train crossed Hog Run bridge—railroad bridge—and that was all the signal that he heard; that he did not hear the bell ring. There was the testimony of other witnesses that while the train was in rapid motion it would not be possible to hear the ringing of the bell on the train, even in the smoking car. This witness, however, testified that he put his head out, was going to look to see whether he could see a coal train, which was following the passenger train, coming behind them, with reference to which you have heard the testimony. When he first put his head out he looked in front and saw the horse just coming down the steep bank onto the railroad track, and then the collision occurred, and he saw two persons, one thrown

down towards the train, and the other towards the side of the hill; that it was about seventy-five yards from the crossing when he saw what I have just stated to you. If that was true, gentlemen, why it necessarily follows, it seems to me, that those in the buggy could see him—that is, could see at least as far back on the train as the smoking car—for the very obvious reason that if I, sitting here, can see the juror sitting in the corner, he, sitting in the corner, must be able to see me; and therefore, according to this testimony, the train was visible to the occupants of the phaeton before the phaeton reached the track." (Record, page 95.)

The first bill of exceptions contains all the testimony introduced upon the trial of the cause. (Record, page 91.)

MRS. ESTHER GRIFFITH testified in chief for the plaintiff below:

"Well, my daughter and myself started to Newark on the first day of August, 1888. We were on what we call the Old Ridgley tract road. I was driving, myself, and after crossing at the bridge, over what we call Hog Run, a little run or creek there, we could see the railroad plain. We were watching for the noon train. Hog Run bridge was not quite a quarter of a mile from the crossing. There is a little hill goes up from the bridge; as we went up the hill we could see in a kind of alley or hollow. We could see quite plain. We drove on very carefully, and there was no sign of a train nor anything like it at that time. We went up to the hill, and when we got to the top of the hill there was a field on this side (indicating right side), a kind of raise. The field was raised and the road was cut down as they cut roads.

Q. You say, "this side;" which side do you mean?

A. On the right-hand side as we were going to the railroad, and in that field was corn. The corn was in full height at that time, and when we got to the top of the hill

we stopped and listened for the noon train, and we listened there for some time, and then we thought there was no train.

Q. Just tell what you did.

A. We didn't hear no sign of a train, so we went on very slow down the hill.

Q. About what time was it when you got there?

A. It was very close—it must have been 12 o'clock, for it was the noon train that comes in at 12 o'clock. We went down the hill slow, and as we would come down the hill there is a bank that has been cut down on the side of the road, and on this side (indicating right side) we could not see the train, even when it was coming around there, until we came within so many yards of the track. When the horse got his two forefeet on the track, we seen the train coming just like lightning within a few yards of us. My daughter throwed up both hands and says, 'Oh, Ma!' That was all that passed between us. Instantly the horse was struck in the neck and shoulder and was whirled around just like lightning, and we were dragged around on the side and thrown." (Record, pages 18 and 19.)

"Q. Mrs. Griffith, when you stopped at that place at the top of this bank where you say you stopped and listened—

A. Yes, sir; we did.

Q. Did you hear any sign of a train?

A. No, sir; there was no sign—not a particle of a sign.

Q. Did you hear any whistle?

A. No, sir.

Q. Did you listen for the whistle?

A. Yes, sir; we did—very carefully.

Q. Did you hear any sound of an engine bell?

A. No, sir; there was no bell.

Q. Had you any notice, Mrs. Griffith, that this train was approaching before it was run onto you?

A. No, sir; not until the horse had his feet on the track.

Q. How did you drive down this bank towards the

track? State at what rate of speed, or what care you used.

A. I went down slowly. Our horse was very quiet and went very slowly, and I was going very slowly.

Q. What kind of a day was it?

A. A very warm day; still day; the first day of August.

Q. Was it a clear day?

A. Yes, sir; it was, and the sun was very hot." (Record, page 21.)

On cross-examination, she testified:

"We stopped on the top of the hill.

Q. How far is that from the railroad crossing?

A. I suppose about fifty yards, may be a little more.

Q. A hundred and fifty feet or more. Now, what rate of speed did you say you went as you started down towards the crossing?

A. We were going down very slow, listening for the train, as we knew the noon train—" (Record, page 23.)

She testified further, that she had known the crossing for eight or nine years, had driven across it many times and several times that summer, whenever she went to Newark; that her daughter, who was twenty years of age, knew the crossing also, was familiar with it, and had crossed it a good many times, that she and the plaintiff each saw the train about the same time. (Record, pages 27 and 28.)

"Q. Were you and your daughter talking together up to the time she threw up her hands?

A. No, sir; we did not talk at all. We were talking up on the hill when we were listening for the train, and that was all that passed between us, and we went down slowly until the horse got his feet on the railroad track.

Q. I understand you to say that from the time you passed the corn until the horse was struck, the distance was about as far as from that corner of the room over to that corner of the room?

A. From the corner, I mean from the crossing to the corner of the field up where the corn was up in the field, cater-cornered across the corner, it would be that far—that is where the corn was inside of the field. There was a fence outside of it.

Q. From the time you passed the end of the corn down to the time the horse was struck, where were you looking?

A. I was listening to see if the train was gone by; to see if we could see it.

Q. You say you were looking to see if the train had passed?

Court: She said she was listening.

Q. Which way were you looking?

A. Looking south.

Q. Towards the station?

A. Towards the station; I meant the station on the pike. I was looking south.

Q. Which way was your daughter looking?

A. I suppose she was looking the same—

Q. I am not asking that.

A. That is the way she was looking, then. We were going down to the railroad and looking down that way; looking down towards the rail—to see if we could see the train, and listening for the train.

Q. Looking straight forward?

A. No, sir; looking south, down towards the railroad track." (Record, pages 29 and 30.)

On re-direct examination, she testified:

"Q. State, Mrs. Griffith, how near did you have to get to the iron rail before you could look along the track?

A. The horse had his feet on the rail.

Q. How near does a person have to get to the iron rail before they can see along the track?

A. I don't think they can see hardly until when they get to the railroad.

Q. I am asking about the track—the iron rail. How near would you have to get to the iron rail before you could look along the railroad track south?

A. I don't think I could get hardly—I can not tell exactly; I know that I could not see—I did not see until I was right on the track on account of this hill shutting off the view—a view, and the bend in the road." (Record, pages 30 and 31.)

SOLOMON HOLTZBERRY, a witness for the plaintiff, testified in chief:

That when the train was approaching Locust Grove crossing, he was sitting in the smoking car, on the west side, with the window up. He heard the locomotive whistle just when the train crossed Hog Run bridge; did not hear the bell. He put his head out of the window to look for a coal train following, and saw the accident.

"Q. State what you saw to the jury.

A. I just put my head out, was going to look to see whether I could see coal train coming behind me. When I first put my head out, looked in front first, as I always do, saw the horse just coming down the steep bank, down to the railroad, and it hit, and I saw a couple of persons—one went down towards the train and the other went towards the side of the hill.

Q. Where did it hit the horse; what part of the horse was hit?

A. Looked as if it was back about the foreshoulder." (Record, page 34.)

On cross-examination, he testified:

Q. Mr. Holtzberry, how soon after the train crossed Hog Run bridge was it that you looked out of the window?

A. It was pretty soon. It ain't but a little piece up there.

Q. How far was the train from the crossing at the time you looked out of the window there?

A. I suppose it was seventy-five yards. When I first put my head out I saw the horse coming down the hill. The hill is straight down in there pretty near.

Q. The engine was seventy-five yards from the crossing?

A. I expect it was.

Q. And you were still further back?

A. I was in the smoking car.

Q. And you saw the horse as it was coming down the hill, and it came right on and got onto the crossing, as the train hit it?

A. Yes, sir.

Q. How far back was the horse and buggy when you first looked out—when you first saw it?

A. Pretty near down to the track; half way down the hill, anyhow.

Q. And it went right on?

A. Went on down as far as it could.

Q. It went right on, and the train went right on, and the result was they met right there?

A. They met on the crossing." (Record, page 35.)

On re-direct examination, he testified:

"Q. When you saw this horse, what was the driver doing?

A. It looked to me as if she had the horse's head pulled around with the left line, trying to cross the road as far as she could; it looked as if she was pulling the left line.

Q. It looked as if she was pulling to the left?

A. She was going—

Q. You understood that she was pulling the horse to keep it from going upon the track?

A. It looks so to me." (Record, page 36.)

Mrs. Griffith and Mr. Holtzberry are the only ones who testify directly as to the accident.

As to the opportunities which the plaintiff had to see the train, the testimony for the defendent confirms the statement of Mrs. Griffith, that in the valley or hollow

(before mounting the hill on the top of which she stopped) she had a good view of the railroad for three-quarters of a mile. Mr. Smith, the civil engineer, fixes the centre of this hollow at 245 feet from the crossing, point 3 on plat 197 *b*. (Record, page 101.)

All the witnesses agree that from the top of the hill where the plaintiff and her mother stopped, 150 feet from the crossing, (point 2 on plat 197 *b*,) no view could be had of the railroad towards the south, the direction from which the train was coming.

As to the opportunity to see the train, afforded the plaintiff and her mother, after they started down the descent to the crossing, the testimony of witnesses (other than Mrs. Griffith and Mr. Holtzberry, whose testimony has already been quoted) is as follows:

JOHN NEAL, a witness for the plaintiff, testified:

That he was a farmer, was somewhat acquainted with Locust Grove crossing, had examined that crossing and its surroundings to some extent, partially with a view to testifying, made measurements, (Record, page 39,) in company with plaintiff's attorney and plaintiff's father, (Record, page 43); from the top of the little eminence to the crossing, the county road was formerly very steep but had been graded back, making the slope longer and of even grade from the track for forty yards back; could not tell what the grade is; the railroad passes through a cut which he "would judge" to be from twelve to fifteen feet deep; this cut is eighteen feet wide at the bottom by his measurement; its sides slope about as steep as land will stay in position, somewhere near 45 degrees, he supposes (Record, page 40); there is a curve south of Locust Grove crossing.

"Q. How near did you have to get to the track; well, was there any point from the top down to the track that you could see an approaching train until you got down to the *track*?

A. There was none until you got into the railrad *cut*.

Q. Standing down in the railroad cut *on the crossing;* how far could you see along that railroad south?

A. Well, I suppose about three or four hundred feet." (Record, page 41.)

On cross-examination.

"Q. After you got down to the railroad track, how far did you say you could see south?

A. About three or four hundred feet.

Q. Did not measure that?

A. No, sir." (Record, page 43.)

EBENEZER GRIFFITH, the plaintiff's father, testified:

"Then you come down to the railroad, the horse has to get right down to the railroad and strike within about two feet of the track before you can see south of the railroad a bit. The hill stops you and the bank stops you to see anything until the horse comes right to within two feet of the railroad, and then you can see the south part of the railroad.

Q. You cannot see the track until you come to that point? You mean the track south, I understand.

A. Yes; the track south.

Q. How does Locust Grove crossing—how does the railroad passing Locust Grove crossing as to being in a cut?

A. There is a big cut there.

Q. How deep is it?

A. About twenty to twenty-five feet in some places, and some places only twelve or fifteen.

Q. How wide is the bottom of that cut as it reaches the crossing?

A. Fifteen feet." (Record, page 44.)

Q. "Suppose you stand *on the railroad track* at the crossing, how far southward can you see along the track?

A. About the length of three telegraph poles.

Q. You mean the distance apart of three telegraph poles?

A. Yes, sir.

Q. About how far apart are telegraph poles along there?

A. About 180 feet." (Record, page 45.)

JOHN STETMAN, a witness for the plaintiff, testified:

Q. How wide is the bottom of the railroad there—that is before the banks go out on each side, making the cut?

A. About twenty feet.

Q. Say that a person is going west across that track, how near going down the hill—how near would they have to get to the iron rail before they could see along the track south?

A. I should judge ten feet. You would have to go back before you can see it.

Q. Suppose you stand by the side of the track there or on the track, do you know whether there is a curve right south of the crossing on the railroad?

A. Yes, sir; I think the curve begins right near the crossing.

Q. Standing at the railroad track or on the crossing, looking southward, how far can you see the track?

A. I should judge about five hundred feet." (Record, page 53.)

On cross-examination the witness testified that although the curve was toward the east, yet one could not see as far standing ten feet west of the track as he could standing on the track, (Record, page 53.) This testimony is obviously due to the confusion of the witness.

FRANK LEWIS, a witness for the plaintiff, testified:

"Q. Suppose you stand on the railroad tracks, between the rails, looking south, how far can you see the track?

A. About three hundred feet." (Record, page 55.)

"Q. Could a person on top of that last hill, before you come down to the track, in a buggy, see the track?

A. No, sir.

Q. Is there any opportunity of seeing the railroad track driving down from there to the railroad track? Is there any opportunity of seeing the railroad track until you get to the track?

A. No, sir; until you get right to the railroad board fence.

Q. How far is that from the iron rail?

A. About 27 feet.

Q. How near do you have to get to the iron rail to see along the track at all?

A. Well, you can see just as you pass that board fence, and that is about 27 feet.

Q. How wide is the railroad cut at the bottom?

A. About 20 feet.

Q. Is that where the bank commences sloping up?

A. Yes, sir." (Record, page 55.)

W. A. SMITH, a witness for defendant, testified:

That he was a civil engineer in the employ of the defendant, and that he made a survey of Locust Grove crossing and its surroundings, the last of August, 1888, and made the plat 197*b* (see Record, page 101); the railroad cut is 20 feet wide at the bottom, and the bank of the cut on the west side of the railroad south of the crossing is 9 feet high at the highest point. (Record, pages 57 and 58.)

"Q. I will ask you if you observed on the highway at what distance you could see looking south?

A. Yes, sir.

Q. What was it?

A. At a point 24 feet west of the crossing, an engine can be seen for eleven hundred feet down the track, I measured the distance." (Record, page 58.)

He further testifies that the plat is drawn to scale, and represents the vicinity of the crossing. The curve begins about at the south of the crossing, curves towards the east and southerly from the crossing. It is about a two-

degree curve, (he tested it,) and is correctly shown on the plat. (Record, page 60.)

On cross-examination, he testifies that he measured the railroad cut at the crossing, and found it twenty feet wide; that the county road has a gradually descending grade from the highest point to the rail, the only level place being right at the crossing between the rails; that the railroad banks slope at about 45 degrees, or one and one-half to one; that a person standing on the track could see southward along the track about six hundred feet. (Record, pages 61 and 62.)

The defendant presented thirteen specific instructions and requested the Court to give each of them to the jury, said requests for such instructions being asked severally. (Record, pages 92-93.) The ninth and tenth instructions asked are as follows:

"9. The testimony in this case shows that the plaintiff was guilty of negligence, contributing to her injury. Such being the fact, she is not entitled to recover, and your verdict must be for the defendant.

Which instruction the Court refused to give; to which refusal of the Court the defendant excepted.

"10. It was the duty of the plaintiff to stop before driving on this railroad track, and allow the train to pass before she attempted to cross, and if she failed so to do and was thereby injured, she cannot recover in this case." Which instruction was likewise refused, and exception taken. (Record, page 93.)

The jury found a verdict for the plaintiff.

The defendant filed a motion for a new trial, the first ground of which was that "the Court erred in refusing to direct a verdict in favor of the defendant;" the third ground that "the jury disregarded the law, as given them in the charge by the Court," and the second, that "the verdict is against the weight of testimony and contrary to law." (Record, page 101.) The Court overruled the motion, filing an opinion printed at pages 12 to 14 of the

Record. The second bill of exceptions covers this action of the Court. (Record, page 102.) Judgment was entered in favor of the plaintiff for $5,154.17, to reverse which the present writ of error was sued out.

Assignment of Error.

The assignment of error shows among other errors, the following:

"*Sixth.* The said Court erred in refusing to give the ninth charge asked by the plaintiff in error.

"*Seventh.* The Court erred in refusing to give the tenth charge asked by the plaintiff in error.

"*Tenth.* The Court erred in overruling the motion of the plaintiff in error for a new trial.

"*Eleventh.* Upon the whole record, judgment should have been rendered in said cause in favor of the plaintiff in error and against the defendant in error, instead of the judgment which was rendered." (Record, page 1.)

The plaintiff in error contends that on the undisputed evidence in the case, the defendant in error was guilty of contributory negligence *in law;* and that the Court below abdicated its functions in submitting the question of contributory negligence to the jury, instead of itself deciding the law of the case on the undisputed facts.

Argument.

The case of Horn vs. Baltimore and Ohio R. R. Co., decided by the Circuit Court of Appeals, Sixth Circuit, February 7, 1893, and reported in 54 Fed. Rep. 301, grew out of a highway collision in the village of Utica, Ohio. In that decision, the Court lays down the law of contributory negligence, applicable to the case at bar, as follows:

"Section 3337 imposes a penalty upon the 'engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section,' and further provides that 'the company in whose employ such engineer or person in charge of an engine is, as well as the person

himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person."

While this statute subjects railroad companies to liability for the damages occasioned by its violation, it does not confer a right of action upon the person injured, unless the omission of the signals caused the disaster. It does not absolve a plaintiff from the consequences of his own negligence. This statute, or its equivalent, has been construed by the Supreme Court of Ohio, in Pennsylvania Company vs. Rathgeb, 32 Ohio St., 66. It is there said:

It is evident from this language (of the statute), that the failure to give signals must have occasioned the accident, that is, must have been the proximate cause of it, before a recovery can be had. The injury must happen by 'negligence of the engineer.' If it occurred from some other cause, liability cannot arise therefor, under that statute. Indeed, this statutory duty is not different, in the responsibility it imposes upon a railroad company, from that arising under the common law. * * * Before, therefore, the plaintiff can recover because the signals were not given, he must cause it to appear that this failure of duty brought about the disaster; for, if his own imprudence was the moving cause, he cannot maintain his action, although the company may not have observed the provisions of the statute.

To the same effect are the cases of Railroad Company vs. Elliott, 28 Ohio St., 346; Railroad Company vs. Whitacre, 35 Ohio St., 627, 630.

This ruling in no degree conflicts with the rule of the Federal Courts that the onus of showing contributory negligence is upon the defendant. That defense may be, and often is, founded upon the facts shown by the plaintiff's evidence alone. While there was clearly an infraction of the statute, which is evidence of negligence on the part of the train hands, in the failure to ring the bell, because the statute requires both ringing of the bell and

the sounding of the whistle within the prescribed limits, the action must fail if it appears that the decedent contributed to his own death by his negligence. If but one inference can be legally drawn from the facts, and it would have become the duty of the Court to set aside a verdict for the plaintiff had the issue been submitted to them, then the instruction was clearly correct.

Improvement Company vs. Munson, 14 Wall. 448.

Pleasants vs. Fant, 22 Wall. 120.

Schofield vs. Railway Company, 114 U. S. 615.

That it is the duty of a traveler upon a highway, when approaching a railroad crossing, to make vigilant use of his eyes and ears, is a proposition upon which the Federal and State Courts are in entire harmony. The traveler must look and listen before venturing to cross the track at any time. It has been well said that a railroad track is itself notice of danger. The necessity of this vigilence, which is the dictate of common prudence, is the more imperative when the traveler is familiar with the crossing, when its dangers are apparent from its surroundings, and when, from long residence in its vicinity, he may fairly be presumed to know, approximately at least, when a train may be expected. Under such circumstances, any relaxation from that degree of care which such knowledge requires is the omission of a duty which bars recovery."

(Ib. 303, 304.)

The judge below in his charge instructed the jury as follows:

"Now, gentleman, I have to say to you with reference to the approach of the plaintiff and her mother to this track, that if, at a distance equal to that *indicated by the mother*, the line across the Court room from the place where the horse was struck, the track could be seen, and if they knew, *as the mother testifies they did*, that it was about the time for the train, it was unquestionably their duty to

stop and listen there. The very fact that that between the top of the hill at a distance of fifty yards back from the track, they were at the last point where they could see the train, and from there down to the end of the cornfield they had been passing over a little piece of road where the track and the train were not visible, would make it the more necessary to stop and take the precaution of looking and listening before going on the track. *Now, is there any evidence in the case that they did stop, or is the evidence on the other hand, that they continued slowly, it is true, but nevertheless, without stopping, from the top of the hill right on to the track?*

If that was the case, gentlemen, why, sad as the results were, the claim against the railroad company could not be maintained. It is not the mere fact of the happening of the accident that lays the foundation of a recovery. It must be based upon satisfactory proof that there was not only negligence on the part of the defendant, but that there was no contributory negligence on the part of the plaintiff. With reference to the proposition that there was contributory negligence, the burden of proof is upon the defendant and you must be satisfied of that by a preponderance of evidence, before you find that there was contributory negligence." (Record, page 98.)

This charge was equivalent to telling the jury that if they believed the testimony of the plaintiff's witnesses they must find for the defendant; but that they could disregard that testimony if they wished, although there was absolutely no other evidence as to the failure to stop.

The plaintiff's mother testifies, over and over again, that they kept right on—slowly, but continuously—from the stopping place on the hill (where, by the way, the statements of all agree no sight of the train could be had) till the two fore-feet of the horse were over the rail. The plaintiff's witness, Holtzberry, testifies that, looking out of the smoking car window, he saw the buggy and its occupants approaching the track, and that they kept right

on without stopping. There is no other evidence in the case; and yet the judge leaves it to the jury, in terms, to find whether there is any evidence that the plaintiff and her mother stopped before going on the track.

That if they had stopped they could have seen the train, is proved not only by the undisputed testimony of Holtzberry, the plaintiff's witness, that he saw them, but also by the testimony of all the witnesses on both sides who testify as to the locality. There is no conflict in the testimony of these witnesses to take the question to the jury. All the witnesses, including the plaintiff's mother, agree that there was a space where the plaintiff could have stopped before going on the track, and from which she could have, in safety, seen the train approaching. Even without the testimony of defendant's civil engineer establishing, by actual measurement, that at a point 24 feet from the rail a train could be seen 1100 feet away, the testimony of the plaintiff's other witnesses confirms that of Holtzberry and establishes beyond question the fact that the occupants of the buggy had or could have had a clear view of the train.

Indeed, the judge in his charge assumes throughout as undisputed that there was a space where the plaintiff and her mother might have stopped before going on the track and have had a view down the track; he left it to the jury to say whether they did stop, when the mother and Holtzberry had both testified that they didn't, and there was no other evidence on the point.

The testimony of the mother that the plaintiff and she, while proceeding slowly, were looking toward the south, the direction from which the train was expected, does not raise a conflict of evidence for the jury.

In Railway Co. vs. Elliott, 28 Ohio St. 351, the Court quotes with approval the language of the Supreme Court of Iowa in Artz vs. Chicago, &c., R. R. Co., (34 Iowa, 154), as follows:

"But it is urged by the appellee's counsel, that the plaintiff testifies that he did both look and listen to see

and hear the train, but did not, and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made a question of fact for the jury. The difficulty, however, with the position is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness, having good eyes, should testify that at the time he looked and did not see it shine, could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself believe it was so, and this belief may have ripened into a conviction of its verity, and possibly he even may testify to it in the self-consciousness of integrity; but after all, in the very nature of things, it cannot be true, and hence cannot in the law form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. But an object and power of sight being conceded, the one may not negative the other."

The statement of Mrs. Griffith, that she looked south and yet did not see, is inconsistent not only with all the testimony as to the locality, and with Holtzberry's testimony, but also with her own statements as to the possibility of sight and the proximity of the train when her horse reached the rail. The plaintiff was familiar with the crossing and knew the train was due, she had no sight of the track, after passing the hollow, 245 feet back, she stopped on top of the hill 150 feet from the crossing where she had no view whatever. Under these circumstances to proceed, even slowly, right down on to the track without stopping, was negligence in law.

In *Pennsylvania R. Co.* vs. *Beale*, 73 Pa. St., 504, the line of railroad was obstructed from view of a traveler approaching a crossing in a wagon, and he did not come to a stop before crossing, and it was held to be contributory negligence, defeating recovery for the death of the traveler. SHARSWOOD, J., said: "The evidence of the plaintiff showed a clear case of contributory negligence in the deceased. The crossing at which he met with the injury, which resulted in his death, was a dangerous one, and, as he was well acquainted with it, there was the greater reason that he should exercise the utmost care and caution by stopping at the railroad before undertaking to pass over. It is very clear, that if he had done so, but for a few minutes, the accident would not have happened. This evidence," said the Judge in his charge, "is uncontradicted that there was a level piece of ground about ten feet wide between the hill or bluff and the first track, or siding on the approach to the track, from the valley upon which the deceased was traveling. It was his plain duty to have stopped at that place."

Judge SHARSWOOD further said: "The duty of stopping is more manifest when an approaching train cannot be seen or heard than where it can. * * * There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the Court. *North Pas. R. Co. vs. Heileman*, 49 Pa. St. 60. It was important, not so much to railroad companies, as to the public. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers, and will do so again if travelers crossing railroads are not taught their simple duty, not to themselves only, but to others."

To the same effect are—

Rhoades vs. Chicago & G. T. R. Co., 58 Mich. 263.
Schufert vs. Chicago, &c. R. Co., 62 Iowa, 624.
Turner vs. Hannibal, &c. R. Co., 74 Mo. 602.
Gorton vs. Erie R. Co., 45 N. Y. 660.
Delaware, &c. R. Co. vs. Toffey, 38 N. J. L. 525.

We submit that the Court below erred in refusing to direct a verdict for the defendant, (Southern Pacific Company vs. Seley, 152 U. S. 145); and erred also in overruling the motion for a new trial.

JOHN K. COWEN,
HUGH L. BOND, JR.,
For Plaintiff in Error.

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In the Supreme Court of the United States.

The Baltimore & Ohio Railroad Company,
Plaintiff in Error,

vs.

Emma Griffith, Defendant in Error.

BRIEF

of S. M. Hunter, for Def't in Error.

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In the Supreme Court of the United States.

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Brief of S. M. Hunter, for Def't in Error.

I.

INTEREST ON VERDICT.—JURISDICTION.

This writ of error should be dismissed for want of jurisdiction in this court.

This is an action in tort for unliquidated damages, for personal injuries. The case was tried to the jury and a verdict for even $5000. The court below, after it overruled the motion for a new trial, added interest on the verdict, and added the interest and verdict together and gave judgment for the amount, which made the judgment more than $5000. (Pr. Rec. 16.) The plaintiff below contended, then and there, that there should be no interest on the verdict; that the judgment should be for no more than the verdict, and prayed to be allowed to remit the interest and take judgment for the $5000, the amount of the verdict, and entered the proper exceptions.

This makes the first question presented in this court one of jurisdiction. The jurisdiction of this court depends upon the amount of the judgment. The verdict in the court below was for $5000. Now if the judgment should be for the amount of the verdict, then it should be but for $5000 and this court would not have jurisdiction. But the court below did not render a judgment for the amount of the verdict, but calculated interest to the time of the judgment, and rendered judgment for verdict and interest, to an amount over $5000. If adding interest to the verdict is warranted by law, then this court has jurisdiction; if it was not warranted by law, then this court has no jurisdiction, and the writ of error, for that reason, should be dismissed.

I contend that it has always been the law that no interest could be allowed except by virtue of a contract or a statute.

"It follows inevitably and irresistibly upon the universal principle of all law, that a man cannot be made legally liable to pay interest, as such, without his own agreement to that effect. All liability must be created by law, or by agreement."—*Rennsaler Glass Factory vs. Reid, 5 Cowen 587-609.*

"It is conceded that at common law, judgments, whatever the cause of action, did not bear interest."—*Railroad vs. Harmon, 147 U. S. 571–584 5.*

"At common law neither verdicts nor judgments bore interest."—*Massachusetts Benevolent Association vs. Miles, 137 U. S. 689 691.*

In the case at bar, and in the State of Ohio, no interest should have been allowed on the verdict. It will not be claimed that interest should be allowed on the verdict under any contract between the parties. This is an action of pure tort. Then it must be allowed on the verdict by the provision of some statute of Ohio, or of the United States, in order to warrant it. There is no such statute in existence, and never was.

This case having come to this court from the Southern District of Ohio, on this question the court will be governed by the Ohio Statute. If that statute provides for interest on the verdict, then the interest is all right; if it did not, then interest should not be calculated on the verdict. The question of interest is always one of local law.—(*Massachusetts Benevolent Association vs. Miles, 137 U. S. 689.*)

At common law in Ohio, judgments do not bear interest.

"At common law, judgments did not draw interest, nor would they do so in Ohio, in the absence of statutory provisions on the subject."— *Marietta Iron Works vs. Lottimore, 25 Ohio St. 621-627. (1874.)*

The following are the Statutes of Ohio on the subject of interest:

Sec. 3179. (*Maximum rate which may be stipulated in instruments.*) The parties to a bond, bill, promissory note, or other instrument of writing for the forebearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per centum per annum, payable annually.

Sec. 3180. (*Rate upon judgments on instruments containing stipulation.*) Upon all judgments, decrees, or orders, rendered upon any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with the provisions of the preceding section, interest shall be computed till payment, at the rate specified in such instrument.

Sec. 3181. (*Rate when no stipulation, and in other cases.*) In cases other than those provided for in the two preceding sections, when money becomes due and payable on any bond, bill, note, or other instrument of writing hereafter made, upon any book account, or settlement hereafter made between parties, upon all verbal contracts hereafter entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of a contract hereafter made, or other transaction which hereafter occurs, the creditor shall be

entitled to interest at the rate of six per cent. per annum, and no more.

Now, then, it will be perceived that this Ohio statute as to interest on judgments is in harmony with Revised Statute U. S. Sec. 966, which provides for interest upon judgments, but not upon verdicts.

Let us apply the reasoning and *dictum* of the Supreme Court of the United States, construing section 966, in the case of *Massachusetts Benevolent Association vs. Miles, 137 U. S. 689-681:*

"Did the case rest solely upon the statute [Sec. 966] it is difficult to see how interest could be computed upon the verdict, inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment."

But the court goes on to say that for the reason that the Statute of Pennsylvania, (being the locality) made it lawful to compute interest on the verdict, that this court would be bound by it, and hold the computation of interest on the verdict to be lawful, and if interest and verdict together made more than $5000 that jurisdiction would attach, saying:

"We regard this statute as settling this question in favor of our jurisdiction. Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several states to allow interest upon verdicts, and where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the Federal Court."

But while the Statutes of Pennsylvania and New York allow interest on verdicts, the statute of Ohio does not; so that neither by the common law nor statutes of the United States, or of the State of Ohio, is interest allowed upon verdicts. Hence, in the case at bar there should have been simply a judgment for the amount of the verdict.

But it is contended by the defendant in error, that the cases of *Shroat vs. Butler, Wright's Rep. 157*, and *Kimball vs. Connely, 1 Western Law Monthly 402*, both Ohio cases, control in this matter. I do not think so. The case in Wright's Reports is a mere *obitur dictum*, decided in 1832. The question of interest was not before the court, and never in my knowledge was it ever followed in any other case. This court although called Supreme Court is not the court of last resort of Ohio. It was a migratory, *nisi prius* Court, having its jury. It is the intermediate court between the Common Pleas and the Supreme Court in bank. Its decisions are not reported in the Ohio Reports. This court is the mere predecessor of what was called the District Court, and with the same jurisdiction. The District Court is the mere predecessor of what we now call the Circuit Court. All these courts were intermediate and had substantially the same jurisdiction, and have not and never had any controlling authority in Ohio. The character and *status* of this court are set out in the preface to Wright's Reports.

The court in Wright's Reports did not decide, as has been intimated, that "interest will be allowed on awards and verdicts where payment is delayed up to the time of judgment." In that case there was neither jury nor verdict. It was simply an award.

This is what the court said *verbatim:*

"The law allows interest on all balances due on settlement; 29 O. L. 451. Here is a balance found due. If it were the verdict of a jury, and judgment had been delayed, we should allow interest if asked, although we know no practice of the kind in the state. We see no objection to interest here."

Here no interest was asked, but plaintiff disavowed any claim to interest, and with all the power she had, objected to its being allowed.

Now, as to the other Ohio case, in the *1 Western Law*

Monthly 402. This is District Court case, and the decision is squarely in favor of my contention. I cite the Ohio Statute on the subject of rendering judgments:

Sec. 5326. (*Must be entered by Clerk upon verdict.*) "When a trial by jury has been had, judgment must be rendered by the clerk in conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration."

The case of *Kimball vs. Connely, 1 Western Law Monthly, 402,* is cited by Judge Sage in his opinion overruling the motion for a new trial. (Pr. Rec. 15.) It does not hold that interest might be computed on a verdict. It simply holds that if the case was pending when the term commenced then no matter when, in the term, the trial may be had and verdict rendered, the judgment will be entered as of the first day of the term. This action was pending when the term commenced. Here is the decision in full except sylabus.

By the Court.—"This record raises the question, up to what time ought interest to be collected, when a judgment is entered; and from what time does a judgment draw interest? On full consideration, we lay down the following rules, by which we believe, these questions should be settled, and by which the practice should be governed. 1. Where the action is pending at the commencement of the term at which the judgment is entered, it takes effect from the first day of the term, and interest should be calculated on the debt up to that day; and from that date will the judgment draw interest. 2. Where a judgment is rendered on confession, or if the action be commenced after the first day of the term, the judgment takes effect only from the date of its entry; and hence, interest on the debt should be collected up to that date, and from that date the judgment will draw interest."

Now this case contradicts the case in *Wright's Reports, 157.* Here by no possibility can there be interest on the verdict. No matter when the judgment is really rendered it relates back to the beginning of the term. And then

the judgment draws interest from the first day of the term. If you add interest on the verdict, to the rendition of the judgment, and then render judgment for the aggregate amount, then have it relate back and take effect as of the first day of the term, then again draw interest from the first day of the term, you have double interest, and interest on interest. That is, you incorporate interest on the verdict into the judgment, and for that very same period you allow interest on the aggregate.

Again the jury may incorporate interest as part of the damages in their verdict. If interest is calculated on such a verdict, then is interest compounded, and if judgment is rendered for this aggregate, and interest on this judgment, it is again compounded.

The fact is the rule laid down in *1 Western Law Monthly, 402*, is the rule of practice in Ohio, and I believe without an exception. Interest is allowed if proper up to the first day of the term. The judgment takes effect as of that date, and then interest on the judgment from that time. It is a good, safe, practical rule. Judges in charging juries invariably say if you find for the plaintiff, you will give interest, if it be a proper case for interest, to the first day of the term. Interest on a verdict is never heard of in Ohio. Applying the rule to the case at bar. The term commenced on the first Tuesday of June, 1890. Trial commenced on June 6, verdict rendered June 10. At the latter part of the term, in December, motion for a new trial was overruled, and judgment on the verdict. Now according to the Ohio rule the judgment should have been for $5000, relating back and taking effect on June 3, the first day of the term, and draw interest from that time. But in no event would there be judgment for more than the verdict, $5000.

Some other cases were cited against the contention of

In Ohio no interest except by statute.
Hagby v Bank. 26 Ohio St. 81,
R.R. Co. v Timmo Co. 49 Ohio St. 118.

the defendant in error, on this point, in the argument below, and which I will briefly review:

The case of *Owens vs. B. & O. R. R. Co., 35 Fed. Rep. 715*, is a case where the point was never raised, nor even alluded to, in any manner whatever.

The case of Gibson vs. Enquirer, 5 Central Law Journal, 446, is simply a decision of the Circuit Court, and not controlling in this case.

The cases of *Redfield vs. Ystalyfero Iron Company, 110 U. S. 177*, and *Steamship Company vs. Merchant, 133 U. S. 375-379*, are cases tried in New York, and consequently are controlled by the interest statute of that state which allows interest on verdict; just as this court was controlled in *Mass. Ben. Ass. vs. Miles, 137 U. S. 689*, by the Pennsylvania Statute which also allowed interest on verdicts. In the above case in 110 U. S. 177, the court refused to allow interest on the verdict, although a New York case, for the reason that an inexcusable delay of twenty-nine years elapsed between the verdict and the judgment. The court said on page 177:

"The Statute of New York allowing interest on verdicts, relied on in argument as applicable, was intended for the ordinary practice of the court, and cannot furnish the rule for a case that is excepted from it by the unexplained negligence and delay of the plaintiff."

The Statute of New York allowing interest on verdicts was passed in 1844, Session Laws of 1844. Before its passage the case of *Lord vs. The Mayor &c., 3 Hill 426 (1842)* was decided, and the court then held interest was not allowed on a verdict. The court said on page 429:

"*By the Court, Cowen, J.* The proceedings under the statute subjecting the corporation of New York to damages on account of buildings officially destroyed to prevent the spreading of fire in the city, are in the nature of an action on the case for damages; and the suit remains open for contest on various grounds till confirmation in the Court of Common Pleas of the city. The inquisition is in

the nature of a verdict in such an action, and the confirmation stands instead of a judgment. Had the whole been in the common law form, the right of the plaintiff to interest would be easily settled so far as the rule of this court is concerned, since the case of *Klock vs. Robinson*, (*22 Wend. 157, 160, 161, et. seq.*) We there examined the question, and none of us felt any doubt, that in an action of debt on a judgment for a tort as well as other cause, interest might be recovered from the date of the judgment. *But no one would think of going behind that, and claiming interest from the time of the verdict.* The present case being the same principle, the claim of the plaintiff fails as to the interest intermediate the inquisition and confirmation."

The said statute was carried into the code of New York and is found in the New York code of 1852 (Voorhies) as section 310 (265), and which has been substantially in force ever since. It is as follows:

"Sec. 310 (265). *Interest on verdict or report, when allowed.* When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto."

And by the next section it is provided that it shall be added in the entry of the judgment.

Immediately after the passage of this statute, the court of last resort of that state, in the case of Bailey et al vs. Mayor etc., 7 Hill, 146, (1844) held in an action when interest was added to a verdict rendered before the statute took effect, that it was erroneous, saying in the sylabus:

"The third section of the act, passed May 7, 1844, authorizing interest to be taxed upon verdicts, etc., (*Sess. L. of 44, p. 508*), does not apply to verdicts rendered *before* the act was passed, but is to be construed *prospectively*."

This shows what the law of New York as to interest on verdicts was before and after the statute of 1844. And as to the cases in 118 U. S. 608 and 133 U. S. 375, which

were tried in New York, this court in those cases without doubt followed the Statute of New York, as interest on verdicts. Indeed it would have been erroneous in that State not to calculate interest on the verdict to the time of entering the judgment.

Now applying the reasoning of the case of *Mass. Ben. Ass. vs. Miles, 137 U. S. 689*, and there is no escaping the conclusion that in the case at bar, the judgment should have been for only $5000, the amount of the verdict. And therefore the writ of error should be dismissed for want of jurisdiction.

II.

THE ERRORS ASSIGNED.

Notwithstanding my firm confidence in the strength of my position, on the question of jurisdiction, I proceed to the assignments of error.

III.

STATEMENT OF FACTS.

On the first of August, 1888, Emma Griffith, the plaintiff, a young girl, was riding with her mother, Esther Griffith, being country people, in a phæton buggy, from their home in the country, to Newark, Ohio. Their home was about 8 miles from the place of the injury, and about 12 miles from Newark, Ohio. The mother was driving and simply bringing the plaintiff to Newark. About 4 miles south from Newark, it was necessary to cross the track of the railroad, at a place called Locust Grove Crossing. When at the crossing a passenger train, going at the rate of 45 miles an hour, struck the horse in the neck, wrecked the buggy, knocked the plaintiff about 40 feet, and inflicted a wound in her head, fracturing the skull and

injuring the brain; and which resulted, among other things, in convulsions and loss of memory, which continued up to the trial, and ever since; also resulting in a long spell of sickness, the injuries being permanent.

The action for damages was commenced in the State court, and removed to the Circuit Court of the United States, of the Southern District of Ohio.

The evidence shows that the *locus in quo* is about as shown by the plat of "Locust Grove Crossing, and its Surroundings," made part of the record. The railroad runs nearly north and south. The highway crosses it at right angles. The train was coming from the south and the buggy was coming from the west. The crossing is in a cut from 12 to 18 feet deep; made so, because the railroad runs into, and through a small hill. The highway approaches the crossing through the same hill; that is, it goes down a graded cut in the hill to the level with the track at the crossing; so that the crossing is in a cut for the track and also a cut for the highway. The track from the south comes to the crossing on a curve through the cut, a curve of 4 degrees through the cut. The slope of the cut is about 45 degrees and was as steep as the ground would stay in position. The bottom of the railroad cut was 15 feet wide (Rec. 44). The road or highway, as it came down to the track was about 16 feet wide (Rec. 44). There is some conflict as to the width of the bottom of the cut, but the evidence shows that it was not over 16 feet wide. It was down in this cut or hole that the collision occurred.

The field on the west of the track, and south side of the highway for over 200 feet, and up to the crossing, was covered with growing corn over 10 feet high, and so with the cut and the corn there was no view of the track whatever, to a person coming from the west on the highway, until they got down into the railroad cut. About this there

is no dispute; the only conflict is, as to the width of the cut at the bottom, of which I will speak further on.

A stream called Hog Run flows westerly under the track at Hog Run railroad bridge 2430 feet, by actual measurement being 210 feet less than half a mile, south of the crossing. This run then makes a wide curve northerly, and passes under Hogg Run county bridge on the highway in question, about 900 feet west of the crossing. The highway from the county bridge runs easterly, a trifle north, until about 300 feet from the crossing, thence east to the crossing. After leaving the bridge, it goes up a small hill, and then through a low place. This low place is about 240 feet from the crossing and is the point where the defendant's witnesses, Smith, Scott and Brady, said a train could be seen coming from the south. This low place extends south, bearing a little east to the Hogg Run railroad bridge, and nearly to the hill in which is the railroad cut and crossing. All the land between this point and the railroad bridge was covered with growing corn, but the place being low, a train could be seen across the low place, coming north over the railroad bridge, and for some distance north and south of the bridge. This train from the point 240 feet west of the crossing could be seen until it ran north into the cut, which commenced about 600 feet south of the crossing, and on a curve to the crossing. The highway then proceeds towards the crossing and passes up the little hill, in which is the cut, and then all view of the railroad disappears, and there is no view whatever, to the south, on account of the highway, being to some extent cut down, and the growing corn on the south of the highway. At the top of this hill, which Neal says, (Rec. 40), and Ebenezer Griffith says, (Rec. 44), is 40 to 50 yards from the track. At this point all concur there is no view of the railroad, on account of the growing corn. The highway from this point is graded down to the cut, leaving a bank on both sides. All concur that

coming down this grade there is no view of the railroad whatever, till you get into the railroad cut itself. The descent is gradual, the highway cut deepening until it reaches the track which it crosses at the railroad level, at the bottom of the cut. This grade comes right down to the railroad.

The horse was struck on the neck and shoulder, just as he reached the west rail. Mrs. Griffith just before the stroke, doing all she could to pull the horse to the left, across the highway, to get it out of the way. The evidence so far as I have stated is without contradiction. Now let us see the *status* of this cut and crossing.

Mrs. Griffith (Rec. 30), says, she could not see the track south until she got to the railroad; that they could not see until they were right on the track, on account of the hill shutting off the view and the curve. As to this witness, Mrs. Griffith, while she was made to say, that from the edge of the corn, to the place where the horse was hit, it was as far as from one corner of the court-room to the other. It does not appear how far that was; she also put it at a distance of a few feet. She was an ignorant country woman, and more or less confused as to distances about her surroundings. She was not in the habit of measuring distances by feet, etc. Then we must consider the distance from the edge of the corn to the fence on the top of the bank; then also the slope of the bank. There was one thing she was not confused about, and that was, that on account of the bank and the curve, although looking all the time, she could not see until her horse was at the rail. Her evidence must be taken together and all the circumstances under which she testified. The counsel for the plaintiff in error simply picked out one or two things in her evidence, and bases his whole claim upon them.

But she testifies as follows: (Rec. 30)

Q. In going down that hill, state whether or not there is a bank on each side of the county road. A. Yes sir.

Q. State, Mrs. Griffith, how near did you have to get to the iron rail before you could look along the track. A. The horse had his feet on the rail.

Q. How near does a person have to get to the iron rail before they can see along the track? A. I don't think they can see hardly until when they get to the railroad.

Q. I am asking about the track; the iron rail. How near would you have to get to the iron rail before you could look along the railroad track south? A. I don't think I could get hardly—I cannot tell exactly; I know that I could not see—I did not see until I was right on the track on account of this hill shutting off the view—and the bend in the road.

I repeat she insists, as a matter of fact that she could not see the railroad south on account of the obstruction, and in this she is amply corroborated. Not only she; but Ebenezer Griffith, (Rec. 44, 45), Neal (Rec. 40), Steadman (Rec. 53), and also by the testimony of the engineer Ryan, (Rec. 66, 67), and the fireman Stone, (Rec. 70, 71, 73 and 74). In fact, the civil engineer Smith only makes the bottom of the cut 20 feet wide, and says you can see south after you get within 24 feet of the rail. Neal says, (Rec. 40), the railroad cut at the bottom was 18 feet, by his measurement, (Rec. 41). You would have to get into the cut before you could see an approaching train.

He says, Rec. (Rec. 40):

Q. Does the railroad pass through a cut at Locust Grove Crossing? A. Yes sir.

Q. How deep is that cut? A. Well I would judge that that cut was from 12 to 15 feet deep.

Q. How wide is that cut or was it at that time, at the bottom? A. At the bottom it is 18 feet by my measurement.

Q. Then how does it slope up? I am referring to the railroad cut. A. Well, it slopes about as steep as any land will stay in position; somewhere near 45 degrees, I suppose.

* * * * * *

By Judge Hunter: How near did you have to get to the track—well, was there any point from the top down to the track that you could see an approaching train until you got down to the track? A. There was none until you got into the railroad cut.

Q. Is there a curve south of Locust Grove Crossing in the direction the train would come from the south? A. Yes sir.

Q. Standing down in the railroad cut on the crossing, how far could you see along that railroad south? A. Well, I suppose about three or four hundred feet.

Q. You stated the width of the railroad cut, state the width of the county road cut as you went down the hill to the track. A. At the bottom, that part that is about on the level with the tract, for vehicles, is sixteen feet.

* * * * * *

Q. What do you make the whole distance from Hogg Run bridge to crossing? A. 2,430 feet.

Ebenezer Griffith says, (Rec. 44), the cut at the crossing is 20 to 25 feet deep in some places and 12 to 15 feet deep in others; that it is 15 feet wide at the crossing by measurement; that the horse would have to go within 2 feet of the rail before you can see south on the track on account of the hill and bank. He said (Rec. 44):

Q. What direction does the county road go after crossing the Hogg Run county bridge until it crosses the track? A. It comes up the hill and then you come straight towards the track.

Q. I mean how does it cross? What direction does the road go as it crosses the railroad? A. It goes a little to the east.

Q. Very well; go on with your statement. A. We come up to that corner on the top of the hill, then we make a straight shoot for the railroad—that is, the grade that comes down to the railroad—about, I think, a hundred yards you can see the track—the B. & O. track, that is south.

Q. How is that? A. You can see the B. & O. track south a good piece.

Q. Where is that you can see the B. & O. track? A. After you turn that corner and go towards the railroad.

By a Juror: Up on the hill? A. Yes sir; you are up on the hill about 200 yards from the railroad, and then you come down to this here grade and you cannot see the track at all. The corn shut off the view and the high bank, besides.

Q. When you get to the top of the last eminence, how far is it from the railroad track? A. About 40 or 50 yards.

Q. Go on. A. Then you come down to the railroad—the horse has to go right down to the railroad and strike within two feet of the track, before you can see south of the railroad a bit. The hill stops you and the bank stops you to see anything, until the horse comes right to within two feet of the railroad, and then you can see the south part of the railroad.

Q. You cannot see the track until you come to that point? You mean the track south, I understand. A. Yes; the track south.

Q. How does Locust Grove Crossing—how does the railroad passing Locust Grove Crossing, as to being in a cut? A. There is a big cut there.

Q. How deep is it? A. About 20 to 25 feet in some places, and some places only 12 or 15.

Q. How wide is the bottom of that cut as it reaches the crossing? A. 15 feet.

Q. How wide is the roadway between the banks as you come down this hill to the track? A. 16 feet.

Q. How do you arrive at these distances? A. By measurement.

Q. Did you observe this locality at the time of the accident, or a few days afterwards? A. Yes sir.

Q. Could a person in a buggy, if you traveled along there in a buggy at that time, about that time, from the top of the hill down the railroad track—can the railroad track be seen southward? A. It cannot be seen at all, sir; even with a man on top of a load of hay could not see it.

Q. Suppose you stand on the railroad track at the crossing, how far southward can you see along the track? A. About the length of three telegraph poles.

Q. You mean the distance apart of three telegraph poles? A. Yes sir.

Q. About how far apart are telegraph poles along there? A. About 180 feet.

Q. Any of them less than that? A. Some of them a little less; some may be a little more.

John Stedman, (Rec. 52), says, the railroad cut at the crossing is 15 feet deep and the county road is in a cut; the traveled part 15 feet wide, the bottom of the cut 20 feet wide; you would have to go within 10 feet of the rail before you could see south on the track, and then you could not see but 200 feet south; that the curve of the track is a 4 degree curve; standing at the track on the crossing, you could not see south 500 feet; when 10 feet from the track west, you could not see a train more than 200 feet, when coming from the south. He said, (Rec. 52):

DIRECT EXAMINATION BY JUDGE HUNTER.

Q. Where do you live? A. Locust Grove. I live about a quarter of a mile west of the station.

Q. Are you acquainted with Locust Grove Crossing, and its surrounding? A. Yes sir.

Q. State to the jury whether the railroad at Locust Grove Crossing passes through a cut or not. A. Yes sir; it passes through a cut.

Q. How deep is the cut? A. Do you mean the railroad cut?

Q. The railroad cut. A. I should judge it about 15 feet; somewheres near that.

Q. Is this cut right at the crossing? A. Yes sir.

Q. Now state to the jury how the county road approaches that crossing. A. Coming down from the west?

Q. Coming down from the west. A. Coming west it comes down, gradually down, from the top of the hill, until you come down to the railroad. I should judge that the grade there is about three degrees.

Q. Is there any cut in the county road as it comes down to the crossing? A. Yes, sir; that is what I had reference to. That is the grade there. The county road

grade is what I had reference to when I was speaking about the grade.

Q. How wide is the roadway of this county road as it comes down this little hill to the rails? A. Do you want me to give the full dimensions or that part they can travel?

Q. The part that you can travel. A. The part of the road where it can be traveled down next to the railroad it is about 15 feet; somewheres near that. Of course it widens as it goes back further on account of the crossing.

Q. Did you travel along there in a buggy? A. Yes, sir.

Q. What opportunity is there for a person coming down the little grade on the county road and the tracks to see a train coming from the south, supposing it is in August and the corn-field is there? A. There is no opportunity to see the train. There was not at that time.

* * * * * *

Q. Say that a person is going west across the track, how near going down the hill—how near would they have to get to the iron rail before they could see along the track south? A. I should judge ten feet. You would have to go back before you can see it.

Q. Suppose you stand by the side of the track there or on the track, do you know whether there is a curve right south of the crossing on the railroad? A. Yes, sir. I thidk the curve begins right near the crossing.

Q. Standing at the railroad track or on the crossing looking southward, how far can you see the track? A. I should judge about five hundred feet.

CROSS-EXAMINATION BY COL. KIBLER.

Q. Is that considerable of a curve there? A. Well, it is not what we would call a very large curve.

Q. What degree is it? You mention the degree of the road. A. Well, I suppose it is about four degrees; somewhere near that.

Q. Are you familiar with this matter of degrees as to grades and curves? A. Yes, sir; to some extent.

Q. Did you ever try to see how far down the track you can observe? A. Yes, sir; stopped there quite often.

Q. After coming down to the level track? A. Yes, sir.

Q. You say within ten feet you can see some distance? A. You can see about 500 feet, looking down the track.

Q. I am asking how far you can see at that point, ten feet away from the track. A. I do not suppose that you could see a train more than two hundred feet away.

Q. What is the reason? A. On account of the bank.

Q. Which way does it curve, to the west or to the east? A. It curves, going south, to the west—or east; the east.

Q. What point of the hill is in the way to see when you get within ten feet of the tract? A. On the west side of the tract.

Q. Although the curve goes to the east, there is some obstruction in the way of looking from the west side of track? A. Yes, sir; there is a bank there.

Frank Lewis (Rec. 54) says the cut is 15 to 18 feet deep, and (Rec. 25,) that persons standing in the cut on the track could see about 300 feet south, but the cut at bottom is 20 feet wide.

John Ryan the engineer says (Rec. 66) that he was looking straight ahead as they approached the crossing; they did not see the buggy nor the women and did not know he struck it; that he was coming 45 miles an hour; that he could only see the crossing when he was a short distince from it. (Rec. 70.) That there is only a ditch on each side of the track itself and then the slope of the cut commenced. He said (Rec. 66:)

Q. Were you on the right side of the cab when you approached this crossing? A. Yes, sir.

Q. Where were you looking when you approached the crossing? A. Where I am calculated to look—straight ahead for any danger—looking straight ahead.

Q. You could see straight ahead, could you? A. Well, I was endeavoirng to.

Q. Well, could you? Was there a window in the front part of your cab that you could look out of? A. Yes, sir.

Q. Were you looking through the window? A. Yes, sir.

Q. The front window of the cab? A. The front door of the cab; yes.

Q. If any thing had been on the crossing could you have seen it? A. I might have seen it if it had been on the crossing.

Q. As you approached the crossing could you have seen it after you began looking? A. I was looking straight ahead. I was looking for the signal from the station.

Q. Had anything been on the crossing at the time you were looking could you have seen it? A. Yes, sir.

Q. Was there anything on the crossing? A. No, sir.

Q. Anything near the crossing? A. Not that I seen.

Q. Were you looking as the engine came up to the crossing? A. I was. I stated in my answer that I was looking straight ahead.

Q. When you got up to the crossing? A. Yes, sir.

Q. You didn't see anything? A. No, sir.

* * * * * *

(Rec. 67.)

Q. Now, suppose that is the way you were coming around the curve to the crossing and here is Locust Grove station; you were looking across the curve in that direction to see what was at the station, were you not? A. The distance is not but, very short from where I was looking to the cattle-guard, and a man with ordinary eyesight could have seen it, and I consider my eyesight very good.

Q. You saw nothing come on there? A. I seen nothing.

Q. If anything had been coming on there you would have seen it, would you? A. Yes, sir.

Q. If any horse and buggy had got on there you could have seen it? A. If any horse and buggy had been out in front of the engine I would have seen it go on to the track.

* * * * * *

Q. How far were you from the crossing when you could see the crossing? A. I told you I could not tell how far it was.

Q. Well, you say it was a short distance? A. It was a short distance.

* * * * * *

Q. Is it not a fact that there is nothing between the track but the simple ditch and then the slope commences? A. On which side?

Q. West side. A. Yes, sir.

Q. And isn't that embankment as steep as it will stay there, the embankment of the railroad; the slope of the cut is as steep as it will—as the ground will stay there? A. About that way.

Willis R. Stone (Rec. 73) says, being the fireman, that the railroad runs at the crossing through a pretty narrow cut; that the train would have to be within 300 or 400 feet of the crossing, before a person on the engine could see the crossing; that he was looking out, and did not see the women on the track, or near the track.

He said (Rec. 73:)

Q. The railroad runs through a cut, does it not? A. Yes, sir.

Q. Pretty narrow cut?

Court: Unless there is some controversy on that point, and I do not understand that there is, I think I will have to exclude any further testimony on that subject.

* * * * * *

(Rec. 74.)

Q. How near did you have to come to the crossing before you can see it coming from the south? A. I never measured it. I don't know how far it is.

Q. Give us your best judgment. A. I should say between 300 and 400 feet.

Now here is strong evidence from both sides that the cut was very narrow; that you must get into the cut before you can see a train coming from the south. One witness says the horse must be a couple of feet from the rail before you can see it; another that a person must be ten feet from the rail before the track south could be seen. Certainly if the horse's feet were close to the rail, the traveler would be 10 or 12 feet back.

Another witness states that a person standing on the track could not see south on account of the curve and banks, only for 300 feet. The engineer says you must be a short distance from the crossing before the train can see the crossing. The fireman puts the distance at 300 or 400 feet. All of this is corroborated by the statement of both the engineer and fireman; although they were keeping a strict look-out, they neither of them saw the buggy or women near the crossing, and neither of them knew that the collision had occurred. This shows conclusively that the view between the approaching train and the crossing must have been obstructed, except for a very short distance.

IV.

NEGLIGENCE OF THE DEFENDANT.

The following is the statute of Ohio governing signals at railroad crossings:

"Sec. 3336. Every company shall have attached to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle; and the engineer or person in charge of an engine in motion, and approaching a turnpike, highway or town crossing upon the same level therewith, and in like manner when the road crosses any other traveled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from the place of such crossing; but the provisions of this

section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroad locomotives and steam whistles thereon, within the limits of any city or village."

"Sec. 3337. Every engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section shall be personally liable to a penalty of not less than fifty and not more than one hundred dollars, to be recovered by civil action at the suit of the State, in the Court of Common Pleas of any county wherein such crossing is; and the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable to damages to any person or company injured in person or property by such neglect or act of such engineer or person."

This train, by the evidence of the engineer was going 45 miles an hour, or 66 feet a second, and as the evidence strongly shows without giving these signals. The whistle, if it was sounded, was at Hog Run railroad bridge almost one-half mile away, and not in accordance with the statntes which required it to whistle not over 1650 feet from the crossing. The bell was not sounded at all; of all the witnesses on or off the train but two say it was rung and those are the engineer and the fireman. Two witnesses say positively that it did not ring, Spicer and Mrs. Griffith. The others that they did not hear it although their attention was on the train.

The jury was well warranted in finding that no warning was given of the approach of the train, although it was going to and over the crossing at 66 feet a second.

The plaintiff herself did not testify, as it was agreed she had no recollection of the accident (Rec. 32.) It is shown that any allusion to the collision threw her into convulsions (Rec. 47.) We are deprived of her testimony as completely as if she were dead; the loss of memory is because of the accident (Rec. 51.)

But it is also imperative by the statute of Ohio that

the bell should be rung until the engine is over the crossing.

The whistle is not the most important or most effective signal. In the past times when there were no steam whistles except upon locomotives it may have been sufficient. It blew about 5 seconds, and while running only 330 feet, and which would bring the train to about 2000 feet of the crossing. The whistle is not usually a signal of warning or danger. Locomotives whistle for everything. The movements of the train are governed to a great extent by the whistle. Every little factory, machine shop, portable saw-mill, threshing machine, is now equipped with a steam whistle. They are sounded on all occasions, and have substantially ceased to be a signal of danger or warning. Locomotives whistle as often when still as when in motion. They sound from one to four seconds, and are often not heard or noticed.

The bell is the true, recognized and effective signal of danger. It is never rung except as a warning; never rung except when the train is in motion or about to move. It sounds not for a second or two, but rings continuously over the distance until the engine is over the crossing. It is not the few taps of the bell. It is the continuous clang of the bell that makes it an effective warning. The first few taps may not be noticed, but the continuous clang, clang, clang attacks the ear and alarms the traveler, and gives him the warning the statute contemplates.

Negative testimony is often as good as positive testimony. It depends upon circumstances. If two men of equal opportunities are observing a train, and one says he heard the bell ring and the other that he did not, he is as positive as the other.

"Negative testimony is sometimes worth as much as positive, for instance where persons are in a situation to see and hear what transpires, and can neither see nor hear an alleged occurrence; their testimony that such an occur-

rence did not take place is of equal value with that of other witnesses who swear that it did." (72 Ill. 235; 18 Ill. 266.)

"In an action for injuries caused by being run over at a crossing, testimony of defendant's witnesses having charge of the bell or whistle, and interested in proving that the proper signals were given, is not necessarily conclusive, as against the testimony of plaintiff's witnesses that they did not hear the signals."—*Scott vs. Penna. R. R., 9 N. Y. S. 189, American Digest of 1890, page 3230.*

"Evidence that persons observing the locomotive by which plaintiff's intestate was struck did not hear the bell rung or the whistle sounded is sufficient to justify a finding that no such signals were given."—*Perkins vs. Buffalo &c. R. R. Co., 10 N. Y. S. 356, American Digest of 1890, page 3230.*

"In this case the situation of the witnesses near the crossing, in full view of the advancing train, with their attention directed specially to the train, and to the signal or want of signal by blowing the whistle, might make their testimony as conclusive that such signal was *not* given, as the testimony of the same number of witnesses, whose situation and circumstances were less favorable to positive knowledge, it *was* so given."—*Urbank vs. R. Co., 47 Wisconsin 59-65.*

To the same effect see

Beckwith vs. Railroad Company, 54 Hun. 446.

Menard vs. Railroad Company, 150 Mass. 386, 23 Northwestern 214.

V.

NEGLECT TO GIVE SIGNALS—ONE CAUSE OF INJURY.

If the bell had been rung, as the statute requires, there is no doubt but Mrs. Griffith would have acted upon the warning and would have been saved. It is simply absurd that she went in front of the engine, knowing it

was there. Here is proximate negligence on the part of the company, and here is a potent cause of the injury.

"This was question for the jury; and it cannot say that the omission to blow the whistle at a greater distance from the crossing, considering the character of the approach and the rapidity of the train, did not justify the jury in finding that the collision was caused by the negligence of those in charge of the train."—*Railroad Company vs. Crawford, 24 Ohio St. 635 (1873.)*

It is proper to say that the collision referred to in the foregoing case occurred before the passing of the act requirining the whistle to be sounded and bell rung on the approach of the engine to a crossing.

"As to the negligence of the plaintiff in error. The evidence tended, as already shown, to prove that Margrat was in plain view from the locomotive which injured him, from the moment it started, 1500 feet away, until it struck him. If the engineer had looked ahead, he would have discovered Margrat moving along the track in the discharge of his duties. If the bell had been rung, or the whistle sounded, Margrat would probably have heard one or the other; or even if steam had been turned on, as the engine drew near, the noise its escaping made might have given warning. The evidence, however, tended to prove that none of these precautions were taken by the engineer, although he was running his engine at quite a high rate of speed through the company's yards, where brakemen, or other employes of the company might, as we have seen rightfully, be in the discharge of their duties. Surely, from such evidence, the negligence of the engineer might be inferred."—*Railroad Company vs. Margrat, 31 Law Bulletin, 249. 51. O. S. Supreme Court of Ohio.*

"If a train of cars approaching a crossing no signal is given, either by ringing the bell or sounding the whistle, the defendant's railroad company are chargeable with negligence."—*Renwick vs. New York Central, 36 New York, 132, Sylabus. (1867.)*

"In an action against a railroad company to recover damages for the negligent killing of a person, the plaintiff

introduced evidence tending to show that the bell was not rung, nor the whistle blown at the crossing where the accident occurred, as required by the statute. Held, that the absence of this statutory signal was evidence of negligence which would permit the jury to hold the railroad company responsible."—*O'Meara Admr. vs. Hudson River R. R. Co., 38 N. Y. 445, Sylabus.* (*1868.*)

"Evidence had been given tending very strongly to show, that as the train of cars approached the road crossing, the bell upon the locomotive was not rung, or the whistle sounded, as required by statute, and that no signal of the approaching train was given by the persons in charge. In the absence of proof of any negligence or other fault on the part of the plaintiff contributing to the injury, this would have authorized a verdict for the plaintiff. The omission to ring the bell, or sound the whistle, or give other signal, to warn persons who might be on the highway, in the vicinty of the intersection of the railroad track with the public road, of the approach of the train, was, *per se*, negligent, subjecting the defendant to liability for all damages that might accrue to any one by reason of such omission."—*Gorton vs. The Erie R. R. Company, 45 N. Y. 662.* (*1872.*)

"It is the duty of railroad corporations to warn persons who may be traveling on a highway which crosses its road, by some proper signals of the approach of trains and to give such warning in time, so that the traveler may avoid danger. It is not enough in all cases that the statutory signals have been given, to absolve the corporation from the charge of negligence; other precautions may be required under some circumstances."—*Dyer vs. Erie R. R. Co., 71 N. Y. 228, Sylabus.* (*1877.*)

And the jury was justified in finding that negligence caused the injury.

To the same effect are

Imporent Co. vs. Stead, 95 U. S. 166.
Railroad Co. vs. Ives, 144 U. S. 408-418.
Jones vs. R. R. Co., 128 U. S. 445.
R. R. Co. vs. Toxwell, 145 U. S. 209.

VI.

CONTRIBUTORY NEGLIGENCE.—FACTS.

The defense of contributory negligence is not set up in the answer, and for this reason I do not consider incumbent upon me to argue the question of contributory negligence; yet I can with perfect safety approach that question and will do so.

Let us put ourselves in the place of the occupants of the phæton. They are both women. They knew the crossing was there. They were timid about the railroad as other women. They meant to take every precaution, neither desired to commit suicide. The train was behind time. The engineer said several minutes. So then, about noon on the day of the injury, Mrs. Griffith was driving her daughter to Newark in a phæton, the curtains being open and under the seat. She passed the county bridge driving slowly and with a safe horse. She approached the low place at a point 250 feet west of the crossing, a point whence she could see the train at or near the railroad bridge, if one were there. At this point where there was a chance to see and knowing that she was approaching the crossing they stopped to look and listen. Neither heard nor saw anything, for the excellent reason there was no train there. The train at that time must have been three miles south at the National Pike. The engineer says they were going 45 miles an hour, that is 66 feet a second; it would only take the train 3 or 4 minutes to run from the National Pike to the crossing. The train ran from the bridge to the crossing in 37 seconds. Had it been at the bridge when she was 200 feet from the crossing, as the company claims, it would have been over the crossing long enough before she got there.

It was a hot day, and again she started driving slowly up the hill to the point at the top about 40 to 50 yards

from the track, whence it commenced to slope down to the track. Here again they stopped. At this point the view is absolutely obstructed by the cut in the highway and 12 foot corn. They listened. They heard nothing, no train. This was the proper place to stop just before they commenced going down the slope; they heard nothing. In fact the train was then away south of the bridge, Being assured that no train was near, they went on, Mrs. Griffith driving slowly down the hill, both listening all the time and without talking, and heard nothing. It must have taken her a minute at least to get down to the track. The engine whistled, if at all, at the bridge. Spicer says (Rec. 33) that he was watching the train. It commenced to whistle before they entered onto the bridge and probably whistled until it had crossed. This was almost a half a mile from the crossing. The evidence is that she was going very slowly down the hill; the slow walk of a horse is as slow as the slow walk of a man; the inference is reasonable that it took a minute or over. The whistle then must have been blown if at all while she was in the highway cut; the sound obstructed by the cut and corn. They heard it not; the train was 37 seconds from the crossing. If the bell had only rung as required by law there would have been no collision. The engineer said the whistle sounded 4 or 5 seconds. She states positively that she listened and heard it not.

No bell was rung; this is positively shown by the evidence; she looked and listened. She could not see until she got into the railroad cut. With no warning she rightfully assumed no train was approaching. She listened for the first sound, and if she heard a sound she meant to stop. She did not dream a train would rush over that crossing 45 miles an hour without warning. Her horse got into the cut; his feet on the nearest rail; she was back in the phæton; the train was itself coming around the curve like lightning; she pulled on the left or north line to pull the

horse around to the north across the highway, away from the train, (Holsbury Rec. 37), but there was no time and the blow was struck. She made every effort; she did all she could. As she came into the cut when the horse was at the rail she was 12 feet back. According to Stedman's evidence she could not see 200 feet south. The train must have been not over 300 feet away, and would reach the crossing in 4 seconds of time. If the engineer and fireman could not see the buggy, how could it be claimed that the women in the buggy could see the train?

The matter must be looked at from the stand-point of the injured party. The women knew the railroad was there and they meant to avoid injury; they assumed as they had a right to, that the train would give due warning of its approach. She knew it was its duty to do so. That is an important element. She had the right to assume that they would give warning; if she had no other knowledge that the train was coming, then she had the right to go upon the supposition, that where there was no warning there was no train. It was past the time for the train to go by. She did not know whether it had gone or not.

It seems to me if any statement of facts would warrant a recovery for injuries at a railroad crossing, the facts in this case would do so. The Supreme Court of the United States in the case of *Railroad Company vs. Stead, 95 U. S. 166*, holds that all the responsibility of a collision at a crossing does not rest upon the wagon alone, but the train must bear its part of the responsibility, and that the wagon is only required to stop and let the train pass, upon the conditions that the train gives due warning of its approach.

VII.

CONTRIBUTORY NEGLIGENCE. — WEIGHT OF EVIDENCE.

The errors assigned simply mean, that the court erred in not directing a verdict for the Railroad Company after the evidence was all in; and in overruling the motion for a new trial.

This court will not review the action of the trial court in overruling a motion for a new trial.

"With respect to the fourth error assigned, it is sufficient to say that the overruling of a motion for a new trial in the court below cannot be assigned for error, and no authorities need be cited in support of the proposition."—*Van Stone vs. Stillwell & Bierce Mfg. Co., 142 U. S. 128-134.*

Neither will this court review the action of the trial court in refusing to direct a verdict for the defendant, if there be any evidence to support the plaintiff's claim; but will leave the weighing of the evidence and the drawing of inferences from it to the constitutional arbitrament of the jury.

"The whole effort on the part of the plaintiff in error has been to show that upon the evidence, the verdict ought to have been in its favor. That question we cannot consider."—*Grand Trunk Ry. Co. vs. Walker, 154 U. S. 653.*

The trial Judge, who heard the evidence, saw the witnesses, etc., overruled the motion for a new trial. This he did in the exercise of a sound discretion under all the circumstances, and this ought to, and will have its weight with this court.

It is quite true, nevertheless, that the Judge sitting at special term, is from the nature of the case, better qualified, because he sees the witnesses and hears them testify,

to judge whether the verdict is warranted by the evidence, than other Judges, even of the same court, who are called in to decide the same questions upon a report of the testimony in writing; and where the question comes up in general term, on an appeal, all proper allowance will be made, in its consideration, for that difference, and its due weight given to the order of the Judge at special term, denying the motion."—*R. R. Co. vs. Moore, 121 U. S. 558-573.*

VIII.

CONTRIBUTORY EVIDENCE.—THE PROVINCE OF THE JURY.

"Whatever might be our opinion as to the weight of the testimony upon these questions, or upon any one of them, we are unable to say there is no testimony to support the findings of the jury. It is the province of the jury to pass upon the credibility of the witnesses, and upon the consideration and weight which shall be given to the testimony, and when they have passed upon it, and the trial Court refuses a new trial, on the ground that the verdict is against the clear preponderance of the evidence, this Court will not reverse the judgment on that ground, when there is any evidence to support it."—*Pool vs. R. R. Co., 56 Wis. 238.*

The following is the sylabus of the case of *Richmond etc. R. R. Co. vs. Powers, 149 U. S. 43:*

"Where, in an action against a common carrier to recover damages for injuries to a passenger, there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from the conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

"We may now consider it settled, that when the facts are disputed, or when they are undisputed, but that differ-

ent minds, may fairly and honestly draw different inferences therefrom. The exclusive right to draw those inferences is for the jury."—*R. R. Co. vs. Pickley, 24 Ohio St. 668.*

See to the same effect:
Railroad Co. vs. Ives, 144 O. S. 408-418.

"At the conclusion of the trial, the court, at the request of the plaintiff's counsel, instructed the jury that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff."

"As it is the duty of the jury to decide the facts, the sufficiency of the evidence to prove those facts must necessarily be within their province. The jury cannot assume the truth of any material averment without some evidence; and it is error in the court to instruct the jury that they may find a material fact of which there is no evidence. An instruction like this is imperative on a jury; it has taken the place, in practice, of a demurrer to evidence, and must be governed by the same rules. If there be *'no evidence whatever,'* as in the case of Parks vs. Ross, 11 Howard, 362, to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. If this were not so, the court might usurp the decision of the facts altogether, and make the verdict but an echo of their opinion."—*Richardson vs. Boston, 19 Howard (U. S.) 263-271.*

"Proof of negligence, if it exceeds a mere *scintilla* of of evidence is sufficient to send the case to the jury"—*Penna. R. R. Co. vs. Horst, 110 Penna. St. 226. 1 Atlantic Rep. 217.*

To the same effect see *Carver vs. Plank Road Co., 61 Mich. 584. 28 N. W. Rep. 584.*

"But where there is any evidence, direct or inferential of care or caution on the part of the person injured, the question of contributory negligence is for the jury."—*Beckwith vs. N. Y. C. & H. R. R. R. Co., 54 Hun. 446. Affirmed 125 N. Y., 128.*

Ibid. "In this case there were facts and circumstances which at least tended to show that the accident might have occurred without the negligence of the decedent, and we think it was for the jury to say what inferences should be drawn from the facts and circumstances disclosed by the evidence."—*54 Hun., 446.*

"In some cases, too, the necessary inferences from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passenger engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice and an accident happens, negligence may be ruled as a question of law. On the other hand if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible and impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only of what they themselves have seen and heard, the merchant, the mechanic, the farmer and the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw an unanimous conclusion. This average judgment thus given it is

the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single Judge."

"In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the Judge to determine whether proper care was given, or whether they established negligence."

"In Redfield on the law of Railways, it is said: 'And what is proper care will often be a question of law, where there is no controversy about the facts. But ordinarily we apprehend, where there is any testimony tending to show negligence, it is a question for the jury.'"

"In Patterson vs. Wallace, there was no controversy about the facts, but only a question whether certain facts proved, established negligence on the one side or rashness on the other. The Judge on the trial withdrew the case from the jury, but it was held in the House of Lords to be a mere question of fact for the jury, and the judgment was reversed."

"In Mangam vs. Brooklyn Railroad, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The Judge at the trial ordered a non-suit, holding that these facts established negligence in those having custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the non-suit."

"In Detroit and W. R. R. Co. vs. Van Steinberg, the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination."

"It has already been shown that the facts proved, justified the jury in finding that the defendant was guilty

of negligence, and we are of opinion that it was properly left to the jury to determine that point."

"Upon the whole case the judgment must be affirmed."—*Railroad Company vs. Stout, 17 Wallace 657. 1873.*

"The Circuit Court proceeded upon the ground that contributory negligence, on the part of the plaintiff, was so conclusively established, that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict rendered in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the plaintiff was proper. * * * But we are of opinion that the question of contributory negligence should have been submitted to the jury."—*Kane vs. Northern Central Railway, 128 U. S. 91.*

"The evidence is embodied in the bill of exceptions before us, and we cannot agree with the Circuit Court that there was such a clear case of negligence on the part of the plaintiff as to justify the court in withdrawing the whole subject from the consideration of the jury. The plaintiff himself states that he was in the depot of the defendant on business; that the passenger platform was along side of the tracks which ran between it and the depot; that there was also a side track that went through the depot, that he passed out of the depot in the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see the train approaching from the east because there was a car on the side track, and he had no warning of any approaching train, although he listened as he went out of the depot. There also was some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished. On the other hand there was some testimony to show that the plaintiff ran carelessly through the depot; that he knew the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him.

"But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as well as others.

"Instead of the course here pursued a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."—*Jones vs. Railroad Co., 128 U. S. 443. 1888.*

"With respect to the third and eighth errors assigned, it may be said that they are as untenable as the first. A general demurrer to the evidence was interposed by the plaintiff in error at the close of the testimony offered by the plaintiff below, (defendant in error,) and the same was overruled, to which ruling an exception was taken and duly noted. There had been *some* evidence offered in support of the contention of the plaintiff, and the weight of it, under the law, was for the jury to determine."—*Van Stone vs. Stillwell Mf'g Co. 142 U. S. 128.*

And in regard to the error assigned that the court "erred in submitting the case to the jury, and entering up judgment on the verdict," the court on page 135 said:

"The second error assigned is equally vague and without merit. It could not have been error on the part of the court to submit the cause to the jury upon the evidence adduced. The evidence was relevant upon the issues as framed, and the weight to be given to it lay with the jury, who were the proper arbiters of the facts in the case."

The case of *Grand Trunk Railway Co. vs. Ives, 144 U. S. 408* is a railroad crossing case, and one in which the very points made in the case at bar as to the negligence of the company, bell and whistle, and contributory negligence on part of injured party, the questions as to stopping, looking and listening are all fully considered,

and the court there took strong ground that neither negligence nor contributory negligence was a matter of law, but a matter of fact exclusively for the jury. Mr. Justice Lamar said on page 429:

"The determination of what was such contributary negligence on the part of the deceased as would defeat this action, or perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and dilligence as would be expected of a reasonable prudent and careful person, under similar circumstances, *was no more a question of law for the court* than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and dilligence in the one instance than in the other."

The court on page 417 had held that the charge of the trial judge to the jury was correct. That charge was as follows:

"You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under the circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tries the case, nor any other person can supply you with the criterion of judgment by any opinion he may have on the subject."

"But it seems to us that the instruction was correct, as an abstract paincple of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be

gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and say whether the conduct of the parties in that case were such as would be expected of reasonable, prudent men, under a similar state of affairs."—*Railway Company vs. Ives, 144 U. S. 408-416.*

And the following is the law of Ohio, on the provinces of the jury:

"The law of every case, in whatever form presented, belongs to the court; and it is not only the right of the judge, but his solmn duty, to decide and apply it. He must determine the legal requisites to the right of action, and the admissibility of the evidence offered to sustain it. When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, *a question of law* is presented, whether the evidance before the jury *tends* to prove all the facts involved in the right of action, and put in issue by the pleadings. In deciding this question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree tends to prove, must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, *must be taken as fully established.*"—*Ellis & Morton vs. Ohio Life Ins. Co., 4 Ohio S. 628-646.*

VIII.

CONTRIBUTORY NEGLIGENCE.—BURDEN OF PROOF.

The law presumes the injured party was in the exercise of due care. The burden of proving her negligence rests upon the company. It must be shown by the evidence affirmatively that she was in fault.

The following authorities show that this is the law of Ohio, as well as in this Court:

"In England and in most of the State courts, as also in the Federal courts of the United States, contributory negligence is matter of defense, and the burden of proving it rests on the defendant."—*Black's Proof and Pleading in Accident Cases 7.*

"The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurrent negligence, the defendant must prove them and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff."—*Railroad Co. vs. Gladmon, 15 Wallace 407.*

"We may add that it was for the jury to say whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect, was not, under the circumstances and as matter of law, absolutely conclusive of want of due care on his part. *Ford vs. Pittsburg Railroad Company, 110 Mass. 261; Laning vs. N. Y. C. Railroad Co., 49 N. Y. 521.* In such a case as that here presented, the burden of proof to show contributory negligence was upon the defendant. *Railroad Company vs. Gladmon, 15 Wall. 401; Wharton, Negligence, Sect. 423,* and authorities there cited in note 1; *Indianapolis & St. Louis Railroad Co. vs. Horst, 93 U. S. 291.*

I find the following in a note to the paragraph above quoted from *Black's Proof and Pleading in Accident Cases, 7:*

"California—*Gay vs. Winter,* 34 Cal 153 (1857).

"The jury may infer ordinary care and diligence on the part of the plaintiff from his character and habits, and the natural instincts of self preservation; to hold otherwise would be in effect to presume negligence on the part of one, in excuse of negligence on the part of another. Robinson vs. Western Pacific Railroad Co., 48 Ib. 409 (1874); McQuilkin vs. Central Pacific R. R. Co., 50 Ib. 7 (1875); MacDougal vs. Central R. R. Co., 63 Ib. 431 (1883)."

"The general rule is that contributory negligence is a matter of defense. *This is a rule of pleading as well as of evidence.* It has been frequently held that where the evidence of the plaintiff raises a presumption of his negligence contributing to the injury, the burden is upon him to remove the presumption before he can recover. *Railroad vs. Whitacre, 35 Ohio St. 627; Hays vs. Gallagher, 72 Pa. St. 140; Robinson vs. Gary, 28 Ohio St. 241."—Street Railroad vs. Nothenius, 40 Ohio St. 376-380.*

IX.

CONTRIBUTORY NEGLIGENCE.—LAW.

This question of contributory negligence is probably the principal point of attack, and by an inspection of the brief of plaintiff in error, I discover that "contributory negligence" is all that it rests upon.

I contend that we ought not to reach this question at all, as no such question is put in issue by the pleadings. The answer simply admits the plaintiff was injured by the collision, and then simply denies the negligence of the company. There is no averment of contributory negligence, or that plaintiff was in any manner negligent. In the case of *Street Railroad vs. Nothenius, 40 Ohio St. 380,* it is held that "the general rule is that contributory negligence is a matter of defense. *This is a rule of pleading as well as of evidence."*

I call the attention of the Court to at least four railroad crossings, decided by this Court:

Improvement Co. vs. Stead, 95 U. S. 166.
Jones vs. R. R. Co., 128 U. S. 445.
R. R. Co. vs. Ives, 144 U. S. 408.
R. R. Co. vs. Lowell, 145 U. S. 209.

I also call the attention of the court to the case of Baltimore & Ohio Railroad Company vs. Esther Griffith, decided in the Supreme Court of Ohio. She was the mother, and brought her own suit for damages in the state court, for injuries she received in the same collision. The evidence was substantially as in the case at bar. There was a verdict for her in the trial court. A motion was made for a new trial, and one of the grounds was the verdict was not supported by the evidence. The motion was overruled. The company took it on error to the Circuit Court, whose duty it was to review the evidence as set out in a bill of exceptions. That court found no error. It confirmed the verdict, and the judgment was affirmed. The company took it on up to the Supreme Court of the State of Ohio, and the judgment of the Circuit Court was affirmed. It was decided in 1894, being number 3120, but not reported in a printed volume. The record containing the evidence is printed. Now, here was a case based upon the same state of facts, and the evidence being substantially the same as the case at bar. The jury of 12 men weighed and passed upon the evidence; also tne trial Judge in passing upon the motion for a new trial; and the three Circuit Court Judges weighing the evidence in the bill of exceptions, and the whole affirmed by the Supreme Court, and the verdict sustained all the way through. The action of these "fair minded men" ought to be received in this court, on the question as to whether the evidence was sufficient to support the verdict.

X.

CONTRIBUTORY NEGLIGENCE.—LAW OF SELF-PRESERVATION.

The law of self-preservation is one of the elements that must always enter into a question of contributory negligence. For that I make the following citations:

15 Wallace, 401. Crossing Case.

"'I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this as in most other cases depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. *The natural instinct of self preservation would stand in the place of positive evidence*, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. The culpability of the defendant must be affirmatively proved before the case can go to the jury, *but the absence of any fault on the part of the plaitiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration.*'"—*Railroad Company vs. Gladmon, 15 Wallace U. S., 401-407, citing the opinion of Denio J., in case of Oldfield vs. R. R. Co. 3 E. D. Smith, 103.*

Affirmed 14 N. Y. 310.

"Where there is no direct evidence that a traveler did not stop, look and listen before crossing, the presumption is that he observed such precautions."—*McBride vs. Northern Pacific R. R. Co. 23 Pacific Rep. 814.*

Syllabus.

"In an action to recover damages for injuries alleged

to have been occasioned by defendant's negligence, the absence of contributory negligence may be made to appear as well from the circumstances of the case as from evidence directly establishing the fact. In weighing those circumstances it may be assumed that all creatures are desirous of preserving their lives and keeping their bodies from harm."—*Morisen, Administrator, &c. vs. N. Y. C. & H. R. R. R. Co. 63 N. Y. 643.*

"In those courts which do not require the plaintiff to show by affirmative evidence, as a part of his case, that he was free from fault, the absence of negligence on his part may be inferred or presumed from the love of life or the instincts of self-preservation, and the known disposition of men to avoid injury."—*Black's Proof and Pleading in accident Cases, 9.*

Idem, Note on page 7.

"The jury may infer ordinary care and diligence on the part of the plaitiff from his character and habits and the natural instincts of self-preservation; to hold otherwise would be in effect to presume negligence on the part of one in excuse of negligence on the part of another. Robinson vs. Western Pacific R. R. Co. 48 California, 409; McQuilkin vs. R. R. Co. 40 Cal. 7; McDougal vs. R. R. Co. 63 Cal. 431."

"Thus, where plaintiff's intestate was found dead in the morning, in an excavation made by the defendant, along the sidewalk of a street, and there was no direct evidence in the case as to how he came there, Mr. Justice Agnew, speaking for the Supreme Court of Pennsylvania, said: [Allen vs. Willard, 57 Pa. St. 347-380.] 'The natural instincts which lead men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight, and constitute evidence for the consideration of courts and juries.' So, in a case in the Supreme Court of Kansas, it was said: [R. R. Co. vs. Pate, 21 Kansas, 539.] 'In addition to the facts proved, the jury had the right to use the knowledge and experience they are sup-

posed to possess, in common with the generality of mankind, in making up a verdict.'"—*Idem 13.*

"The common law presumption is that every one does his duty, until the contrary is proved; and in the absence of all evidence on the subject, the presumption is that the decedent observed the precautions which the law prescribed. In the case at bar no witness was called who saw the occurrence; there is no evidence whatever, whether, in fact, the decedent did stop and look and listen; the presumption is that he did; proof of that fact was no part of the plaintiff's case. The presumption is of fact merely, and may be rebutted; but we are without evidence of the subject. All that we have, is, that as he came upon the railroad, he was struck down by the locomotive. And it was held that a recovery could be sustained."—*Schum vs. R. R. Co., 107 Pa. St. 8.* Cited in 4 E. & A. Enc. Law, 76. Note.

"And it has been held that a jury may infer due care, and the absence of contributory negligence, on the part of a deceased person, from the general and well known disposition of mankind to take care of themselves, and keep out of danger. Northern Cent. R. Co. 31 Md. 357; Johnson vs. Hudson River R. R. Co., 20 N. Y. 65; Gay vs. Winter, 34 Cal. 153; Lehigh Valley R. Co. 61 P. St. 361."—*4 E. & A. Enc. Law, 76. Note.*

"While those on a highway when about crossing a railroad track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly and carelessly imperiled his own life, or entered upon the track of the railroad, knowing of the train's approach."—*R. R. Co. vs. Goetz, 79 Ky. 442.*

XI.

CONTRIBUTORY NEGLIGENCE.—INJURED PARTY MAY PRESUME CARE ON PART OF DEFENDANT.

Mrs. Griffith had a right to rely upon the company to exercise due care in all respects and especially to give the warning required by statute. And if she acted on such reliance, she is without fault, because she had a right to presume the company would not be negligent.

"Where a city council, by ordinance, has prohibited the running of railroad trains through its limits at a greater rate of speed than that named in the ordinance, a traveler upon a street, in such city, crossing the track of a railroad, has a right to presume that the company will conform to such regulation. If he acts in accordance with such presumption in the absence of knowledge of the fact that the railroad company is exceeding such limit in running a train, it will not of itself be an act of negligence. Meek vs. Penn. Co. 38 Ohio St. 632.

"The trial judge did not err in substantially directing the jury to take into consideration all the objects and things at the crossing of the railroad and street, and to consider what was done by the deceased under all these circumstances, and in saying that if they found his action was that of a person of ordinary prudence, that they must also find that he was not guilty of contributory negligence.

"Judgment of the District Court reversed and that of the Common Pleas affirmed."—*Hart vs. Devereaux, Rec., 41 Ohio St. 565. (1885.)*

"It was correct to instruct the jury that he had the right to assume that the defendant would use more care, in view of the obstructed condition of the crossing, than ordinary. The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both. Newman vs. N. Y. C. R. R. Co. 29 N. Y. 383;

Tiddy vs. St. Louis R. R. Co. 40 Mo. 507; Taryhoff vs. Milwaukee R. R. Co. 19 Wis. 515; Hagan vs. 8th Avenue R. R. Co., 15 N. Y. 383; Penna. Co. vs. Ogier, 36 Penna. St. 60-72."—*Thomas Adm. 2 R. R. Co., 8 Fed. Rep. 729.*

"A person about to cross the street of a city in which there is an ordinance against fast driving; has a right to presume in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to danger which can only arise through a disregard of the ordinance by other persons."—*Sylabus, Baker vs. Pendergast, 32 Ohio St. 494. (1877.)*

"It was the dnty of the deceased if he went on defendant's track, to look out for approaching trains, and the violation of the ordinance by the railroad agents would not relieve him from this dnty—but in the absence of apparent danger, the deceased may not have been guilty of contributory negligence, if he was lulled into security by knowing of the regulations prescribed by the ordinance, and by assuming that the company would exercise such care. Correl vs. B. C. R. & M. R. R. Co., 38 Iowa, 120; Jetter vs. N. Y. & H. R. R. R. Co., 2 Keyes (N. Y.) 454; Baker vs. Pendergast, 32 Ohio St. 494."—*Meek vs. R. R. Co., 38 Ohio St. 632.*

"Persons approaching the crossing or about to cross, have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duties, and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from disregard by the gatemen of their duties. Hence, an open gate, with the gateman in charge, is notice of a clear track and safe crossing; when the gates are open and the gateman present it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass onto the tracks through the open gates, without stopping to listen, though the view of the tracks on either side of the crossing is obstructed; nor in such case is their failure, when at a distance of twenty-five feet from the track, to look for locomotives 150 feet or more from the crossing, negligence, although they could

have been seen."—*Sylabus, Railway Co. Schneider, 45 Ohio St. 678. (1888.)*

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid collision. Of course these mutual rights have reference to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend upon many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of the whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing." —*Continental Improvement Co. vs. Stead, 95 U. S. 163-4.*

"For conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence, in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon, the duty of the train to give due and timely warning of its approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout

for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."—*Idem 165.*

"The mistake of the defendant's counsel consists in seeking to impose on the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways, as the railroad companies have to run trains on the railroads."—*Idem 165.*

"A plaintiff approaching a crossing, and stopping from four to six rods therefrom to look and listen, and neither hearing or seeing a signal of an approaching train, is not deemed guilty of such negligence as to justify a non-suit. Negative testimony may have the force and effect of positive testimony."—*Sylabus, Renwick vs. N. Y. Central, 36 N. Y. 132.*

Text.—"Now, upon the question whether the bell was rung or not, it is undeniably true that the considerable evidence was given on both sides. On the part of the plaintiff both he and his daughter swore that they listened for the train as they approached the crossing, and did not hear it. Several witnessas upon the train testified they heard the bell or whistle before the whistle for the brakes at the crossing. Mrs. Thomas, whose house the train passed about fourteen rods before it reached the crossing, swore that there was no signal, either from the bell or whistle; and Mrs. Adams, who was observing the train from the same house heard none. Sacket who was at his house three quarters of a mile east of the crossing, and 100 rods from the track heard the train, but heard no bell or whistle, until the whistle for the brakes. Now, though most of this is negative evidence, and the defendant has on its side, the positive testimony of five witnesses that the bell was rung, still as some of the plaintiff's witnesses were in a condition to hear it if it had been rung, and were giving their attention to the train, the fact that they did

not hear it is evidence conducing to prove that it was not rung. Two of the defendant's witnesses who swore that it was rung, are the engineer and firemen who were in fault if it was not rung. The character of one other was impeached. The conflict raises a question of fact, which the plaintiff had the right to have determined by the jury.

"There can be no pretence that the plaintiff was so clearly guilty of negligence himself, as to require the court to non-suit. His own testimony and that of his daughter, show the exercise of all the prudence which the circumstances required. He stopped and looked and listened, from four to six rods from the track, and hearing no signal or indication that a train was approaching, started his horses and kept looking to the right and the left for the cars until he reached the track, and then turning his eye to the right found them upon him. The train was behind time, and as we must conclude for the purpose of this question, giving no signal of its approach. Although if the plaintiff had stopped at a point near the track, he might have seen the train; his not doing so is not necessarily negligence. The thorough discussion of this question of negligence by this court, in the case of Ernst vs. Hudson River R. R. Co., (32 Howard, 61) renders unnecessary any further discussion of it here. Without an utter disregard of the doctrines of that case, it is impossible to hold that the plaintiff in this case should have been non-suited.—*Id.* 132-3.

"It would be going quite too far in favor of these corporations, using these mighty forces, so irresistable and dangerous to those happening to come in their way, to hold, as a matter of law, that a person receiving an injury had been negligent, and so, remediless, unless he had acted on the assumption that they would in any case act in total disregard of his rights, and their own plain duty towards him and others. The law will never hold it imprudent in any one, to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both, even though such other has once conducted himself in a contrary manner."—Newson, N. Y. C. R. R. Co. 29 N. Y. 383-389.

"Negligence, as I understand it, consists in a want of that reasonable care, which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. The injury, is therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to be adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not have reasonably have anticipated. Thus is the problem complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then prdsented themselves to him, and from that standpoint judging whether he was guilty of negligence nor not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."—*R. R. Co. vs Steinberg, 17 Mich. 99-118.*

I desire to call the attention of the court to the above case of *Railroad Co. vs. Steinberg, 17 Michigan 99.* This is one of Judge Cooley's well considered decisions. On account of the reputation of the judge, because it is a crossing case, and in which nearly every question arose, which is found in the case at bar, including the refusal of requests to charge, I ask the court to examine it fully.

The facts in that case are briefly as follows:

The plaintiff was a hotel keeper in the small town of Holly. His hotel was located on the opposite side of the track from the depot of the defendant, but about 30 feet from the track. On the morning of the injury, in daylight,

he was at his hotel and heard the whistle of a train which was expected, about a half a mile off. He started to go over and across the track to the depot to meet the train. As he left the hotel he looked to the westward, but saw no train, and then walked over to the track and stepped on the track, but was struck by an engine and hurt. When he left the hotel he looked in the direction the train was coming, but saw no train. After he got away from the corner of the hotel, anywhere from there to the track he could see along the track the direction the train was coming for about sixty rods. He heard the whistle, but there was evidence tending to show that the bell was not rung. (The statute did not then require the bell to ring.) There was also evidence that the train was running about ten miles an hour, but that speed was faster than that train had been in the habit of running at that point. The plaintiff did not stop before going upon the track. Verdict and judgment for plaintiff for $12,000.

"As there is a natural presumption that everyone will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. He has a right to assume that every one else will obey the law, and to act on that belief. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances."—*Sherman & Redfield Negligence, Sec. 31.*

In Butler vs. Railroad Co., 28 Wisconsin, 487-504, the company asked the court to charge the jury. "If the deceased man saw the approaching train, or could have

seen it by looking, it was negligence on his part to go in front of it."

The charge was refused. The defendant also asked for a non-suit, and this was refused, and the Supreme Court of Wisconsin approved the judgment, and the court among other things said:

"The request numbered two, which was refused was in these words: 'If the deceased saw the approaching train, or could have seen it by looking, it was negligence on his part to go in front of it.' This request was incorrect, or calculated to mislead the jury, in its second proposition: 'or could have seen it by looking.' The jury might and undoubtedly would have understood from this the natural or physical ability of the deceased to have seen the approaching cars had he looked in that direction—the fact that there was nothing to obstruct his view, which fact alone they were to consider in determining whether he ought to have seen them. The request if granted would have excluded from their consideration all the other facts and circumstances which tended to excuse or prevent the deceased from looking that way, and to show that there was no negligence on his part in not doing so."—*Butler vs. R. R. Co., 28 Wis. 487-504.*

"It is probably true that if he had looked both ways at the moment of stepping upon the track, he could have seen the approaching train, but that might be said of almost every accident of a similar character, and is a degree of care seldom adopted by any one, and would require the impossible feat of looking in opposite directions at the same time, or anticipating the point from which he was to be assailed. The law does not require this; neither is there any rule which will defeat a recovery in cases of this kind, merely because it was possible for an injured person to discover an approaching train. The law does not forbid persons from crossing railroad tracks, or impose upon them exclusive responsibility for damages incurred in making such attempt."—*Parsons vs. R. R. Co., 113 N. Y. 366-362.*

"It was for the jury to determine whether he exercised that care which the law required of him. *He could have probably avoided the accident by stopping before he passed upon the track. But that is a degree of care not usual with very prudent persons. It has not been decided by the courts of this State that a person approaching a railroad is bound as a matter of law to stop*, to avoid the imputation of negligence. [The italics are mine.] And referring to evidence as to the distance at which an approaching train could be seen from various points, the learned judge says: 'Such evidence is frequently very reliable and satisfactory. But it is not necessarily conclusive. Such experiments are made when the witnesses are calm and their whole minds free from any distractions, are intent upon the matter in hand. They cannot be made under the precise circumstances which attended the transaction to be investigated.' And to the same effect among recent cases is Shaw vs. Jewett, (86 N. Y. 616,) where, in answer to the claim that the trial judge erred in refusing to charge the jury 'that if they believed that the plaintiff could have seen the train at distince enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part and he was not entitled to recover,' this court held that there was no error, saying: 'That is not the rule. *The plaintiff is not bound to see; he is bound to make all reasonable efforts to see that a careful, prudent man would make under like circumstances.* He is not to provide against any certain result. He is to make an effort for a result that will give safety; such effort as caution, care and prudence will dictate.' I know of no exception to the doctrine that where there is any evidence direct or inferential, of care or caution on the part of the person injured, the question whether it was in compliance with that rule is for the jury."

"Whether she looked at exactly the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined as matter of law, and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as

one which they alone could answer."—*Greany vs. Long Island R. R. Co. 101 N. Y. 419-423-424.*

I also submit the following crossing cases, each of which supports the position we occupy in the case at bar:

Jones vs. R. R. Co. 128 U. S. 445.
R. R. Co. vs. Ives, 144 U. S. 408.
Improvement Co. Stead. 95 U. S.
R. R. Co. vs. Lowell, 145 U. S. 209.
Dublin R. S. Co. vs. Slattery, 3 App. Cas. 1155, (1878.)
R. R. Co. vs. Pieksley, 24 Ohio St. 668.
Gaynor vs. R. R. Co. 100 Mass. 208.
French vs. R. R. Co. 116 Mass. 537.
Craig vs. R. R. Co. 118 Mass. 537.
Butler vs. R. R. Co. 28 Wis. 487.
Bower vs. R. R. Co. 61 Wis. 457.
R. R. Co vs. Steinberg 17 Mich. 99.
R. R. Co. vs. Crawford 24 Ohio St. 631.
Gaynor vs. R. R. Co. 100 Mass. 208. (1868.)

After dark the plaintiff got off from the defendant's train, and at the station of his destination. The main track passed between him and the depot. But he did not cross the main track but went over a side track that was on the other side of him and in a direction away from the depot, for the purpose of making water, and then on his way home. While crossing this side track he was struck by an engine backing and was injured. There was nothing whatever to obstruct his vision and view of the track. That is what he testified to, himself.

"That he made no halt, but stepped down at once from the platform, looking both up and down the track as he did so, to see if anything was coming over it; that he knew there was nothing to arrive from Newport, because the next thing to arrive was the steamboat train from Bos-

ton to Newport, but nevertheless, before he stepped on the track, looked in the direction of Newport and saw nothing approaching; that he saw no light from a lantern, or from any other source, nor any other indication of an an approaching train, in either direction," that he stepped forward on the track and was hit, and run over.

The trial judge withdrew the case from the jury; but the Supreme Court held that it was a case to submit to the jury and sent it back for trial.

In Massachusetts the plaintiff must prove affirmatively that he is free from contributory evidence. The court in that case said:

"Courts must take notice of that which is matter of common knowledge and experience, and when the plaintiff's case fails to disclose the exercise of ordinary care, as judged of in the light of such knowledge and experience, he shows no right of recovery. Ordinarily, however, it is to be settled as a question of fact, in each case as it arises, upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to."

"No one can be said to be in the exercise of due care who places himself upon a railroad track, without the assurance from actual observation that there is no approaching train. But the degree of caution which he must exercise in crossing will be affected always by the circumstances of time and place. He has the right to rely to some extent upon proper precautions, and the usual signals of warning to be given by an engine or train passing a station

where passengers are leaving another train upon its fresh arrival. So in passing a highway crossing, though bound to the exercise of due care, and not excused by the want of it in the other party, yet it is to be considered that certain signals are usually given by the train at these places, and these usual concomitants may to some extent be regarded in determining the degree of care."—*Gayner vs. R. R. Co. 100 Mass. 208.*

The next is the case of French vs. R. R. Co., 116 Mass. 537. That is also a crossing case. The plaintiff was a woman 67 years old, and approached the crossing in daylight, in an open carriage. She was struck by a car of a freight train which had been separated from the rest of the train to make a flying switch. At a distance of 46 feet from the center of the track, she could see up the track 46 feet in the direction that the train was coming, and at a point 30 feet from the track she could have seen the track for more than a half a mile, but she did not look in that direction from those points, and gave as a reason therefore, that she did not suppose one train would follow another so closely. This is her testimony as shown in the report:

"I am 67 years old. The accident happened about 4 in the afternoon. When I came to the bend in the road, several rods from the crossing, I saw the rear car of a freight train passing down over the crossing. I had a light, open carriage, and an old horse that I had driven for ten years. I was going 4 or 5 miles an hour. I was looking ahead and went ahead without stopping; there was no obstruction in the way. When my horse stepped on to the track, I heard a man shout and looked around. I saw a car near me coming down the railroad; man on it. That is all I know. It was coming quite fast. I was unconscious for some time after. The next I knew I was lying in the road, with blood on my face and severe pain in my head. I was holding the reins. There was no warning in the highway; if there had been a bird there I

should have seen it; no person or flag visible; if there had been I should have seen it."

Cross-Examination.—"I looked straight ahead all the time from the bend in the road till my horse got on to the crossing; I did not look up or down the track; I did not turn my head or eyes to the right or left. I suppose if I had looked up the track just before I reached it, I might have seen the car; the reason why I did not was because I never knew one train to follow another so closely; that was the only reason; I presumed there would be nothing coming so close. There was nothing to prevent my looking up the track just before I reached it that I know of."

Thus it will be seen that the plaintiff in this case did not either stop or look; it is not shown whether she listened or not. It is true that she gives a reason for not looking.

But the trial judge refused to take the case from the jury, and the Supreme Court affirmed the decision, after a verdict having been rendered for the plaintiff. This is what the Supreme Court of Massachusetts said:

"Endicott, J. This case was properly submitted to the jury. The circumstances were peculiar. As the plaintiff approached the crossing, a freight train was passing; and after the last car had passed, she attempted to cross. She was driving with care and watching the road; she heard no signal, received no warning that other cars were coming, and saw no flagman. At a point 46 feet from the center of the track, she could have seen up the track 46 feet; at 30 feet from the crossing, she could have seen the track for a long distance. She did not look in that direction from those points, and gave as a reason that she did not suppose that one train would follow so quickly upon another. She was struck by some cars that were purposely detached from the train that had passed, and which, without warning of their approach, followed the train over the crossing. Of the negligence of the defendant, upon her evidence, there can be no question. Whether the plaintiff was in the exercise of that due care, which

persons of common prudence and intelligence would exercise when placed in a similar position, and whether she was careless in failing to look up the track at the points near the crossing where it was visible, was a question for the jury to determine in the peculiar circumstances of the case."—*French vs. R. R., 116 Mass. 537-540.*

The next Massachusetts case is Craig vs. R. R. Co., 118 Mass. 431. (1875.) That too was a crossing case. In this case the plaintiff drove his wagon on to the tracks of the defendant. He saw the engine that injured him approaching, and could have stopped his horse and permitted the engine to cross in front of him if he had wanted to, but he thought that he could cross safely, as a team in front of him got over safely, so he drove on to the track on which the engine was approaching and was struck. Before his death his deposition was taken in the case. The following is part of his evidence as shown by the report:

"My horse was walking when I first saw the engine. The engine was close by when I first saw it. It was on the west track, while I was on the east. It was right on the crossing when I first saw it. The horse in front of me was walking. I did not start my horse into a trot before I was struck. He continued walking up to the very time he was struck. When I saw the engine, I made no effort to stop my horse, because I thought I could get across easily enough, and safe. If I had not thought I could get across safely, I think I could have stopped my horse. I suppose I could have stopped my horse on seeing the engine if I had tried. Immediately before going on the first track I looked up the railroad northwards toward the depot, to see if any engine was coming. I could not then see the engine, because the freight car was in the way. I had crossed the railroad before four or five times at this hour." (It was about five o'clock in the morning.)

The trial judge arrested the testimony, and directed a verdict for the company, on the ground of contributory evidence. But the Supreme Court of Massachusetts held

that it was error to do so, and that the case should have been submitted to the jury. The following is the sylabus of the decision of Chief Justice Gray:

"In an action against a railroad corporation to recover for injuries occasioned by an engine coming into collision, at a highway crossing, with a wagon in which the plaintiff was driving at about half past 5 in the morning, in December, it appeared that there were six tracks across the highway; that the plaintiff was prevented by the buildings on either side of the highway from seeing the approaching engine until he had driven on to the first track; that then he saw the engine on the further track; that the place was one across and near which engines and cars of all kinds were constantly moving; that the gates, which were arranged to swing across the highway when a train was passing, and across the railroad when the highway was safe for travel, were in the night time swung back so as to leave both the highway and the railroad open; that there was no flag or lantern at the crossing as had been usual when an engineer or train of cars was about to pass while the gates were not so shut; that the plaintiff's horse was gentle; that the plaintiff did not, on seeing the engine, stop or whip up his horse, which was walking; and that he thought he could have stopped the horse on seeing the engine, if he had tried. Held, That the question whether the plaintiff was in the exercise of due care was for the jury."—*Craig vs. R. R. Co., 118 Mass. 431.*

Now when courts of the eminence of the courts of last resort of Massachusetts, New York, Ohio and other states, differ in drawing inferences from the facts and circumstances surrounding the act of crossing a railroad track, how can a single judge say that the omission of one or the other of certain precautions, regardless of the circumstances, constitutes negligence in law, and refuse to take the opinion of twelve practical men in the jury box, whom the law says shall be the triers of facts if they are disputed, or if they are not disputed, who shall draw the proper

inferences from the facts, if the facts and circumstances are such that different inferences may be justifiably drawn.

The following is a case decided in Great Britain in 1878, in which it appears to me that every element is present, which the court below in the case at bar, held to conclusively establish contributory negligence. The plaintiff in the English case went across the track at night, and was struck by a locomotive and killed. There was no evidence that he either stopped, looked or listened, except the inference that he would naturally be careful. There was some obstruction to his view of the train that struck him. The engineer swore that he whistled twice, and other employes swore they heard the whistle. Some persons who were in a situation to hear, said they did not hear the whistle. Yet the court held that the case was properly left to the jury. The following is the case as I find it cited in Black's Proof and Pleading in Accident Cases, 136:

Dublin &c. Ry. Co. Slattery, L. R. 3 App. Cas. 1155. (1878.)

"S. went to the Dublin and Kingston railway station to accompany a relative who was going by the up train to Dublin. It was necessary to cross the line to get a ticket. S. went through a gate and down a pathway and across the line and in front of the train going to Dublin, which was then slowly approaching the station from Kingston. The time was night. There were notice boards warning persons not to cross the line at that point, but there was evidence that the railway servants never interrupted persons who did cross the line there. S. crossed in safety. He obtained a ticket for his relative, who, with two friends was standing on the bank by the side of the line. The train to Dublin had in the meantime arrived and was standing still. S. having got the ticket began to recross the line, being then not in front of the Dublin train, but behind it, in consequence of which that train prevented him seeing anything on the down line which ran from Dublin to Kingston. The down express train caught him

and he was killed. It was a rule of the railway company that the express train should always blow a wistle on approaching the station, and the driver of that train swore that he had whistled twice, and some other servants of the railway company swore that they had heard the whistle. The friends of S. had in their evidence sworn that they were in a situation to hear the whistle if it had been blown, and that they had not heard it, and one of them who could see the down train approaching, swore that he heard the 'rumbling' of the approaching train, but heard no whistle. Held, that this was a case left properly to the jury."—*L. R. 3 App. Cas. 1155.*

XII.

THE OHIO DECISIONS.

Counsel for the defendant in error cited the cases of R. R. Co. vs. Elliott, 28 Ohio St., 340, and R. R. Co. vs. Rathget, 32 Ohio St., 66, for the law of Ohio on this subject. I have only to say that they are what we call in Ohio "Commission Cases," decided by an emergency Court, called a Supreme Court Commission, whose term is two years. They are not Supreme Court decisions, and on the points cited have not been followed so far as I know by the Supreme Court.

The Law of Ohio is properly announced in the follow-lowing Supreme Court decisions:

Railroad Company vs. Crawford, 26 Ohio St. 631.
Railroad Company vs. Picksley, 26 Ohio St. 654.
Railroad Company vs. Schneider, 45 Ohio St. 690.
B. & O. R. R. Co. vs. Esther Griffith, decided in 1894.
Railroad Co. vs. Margrat, 51 O. O.

in the Crawford case, *24 Ohio St. 631*, the Supreme of Ohio said:

"It is unquestionably true that ordinary prudence requires a person in the full possession of his faculties and

senses to use them, before attempting to cross a known railroad track, for the purpose of discovering and avoiding danger from a passing train; and a failure to do so without a reasonable excuse therefor, is negligence, and will defeat an action for an injury to which such negligence contributed.

"This rule does not in any wise impinge on the doctrine which recognizes the right of a traveler on the public highway to the use of the crossing as co-ordinate with the right of the railroad company, but it results as a necessity from the differences of the modes in which the respective roads are made subservient to the public use.

"It must be observed that the rule as above stated, does not preclude a recovery in all cases where the injured party omits to employ his senses to discover and avoid the injury, even though the omission may be regarded as negligent; but only in those cases where the omission *contributes* to the injury. The law, in cases of mutual negligence, is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. Timmons vs. Central Ohio R. R. Co., 6 Ohio St. 105. It is no case of mutual contribution to an injury, where the injured party could not, by the exercise of due care, have avoided the consequences of another's carelessness.

"Again the failure to listen or look for an approaching train, although such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligent. Whether it is so or not depends on the circumstances of the particular case. For instance, other dangers, as well as those from the approaching train, may be impending, and they may be such as demand the entire attention of the person about to cross the track; and if so, a prudent person would be excused from looking or listening for the train. Indeed, the exersice of ordinary care to avoid an injury is all the law requires; and no one can be held to be negligent who exercises such care. True, when the danger is imminent and human life is at stake, great precaution should be exercised; but this is only ordinary care under the circumstances; because persons of ordinary pru-

dence, under such circumstances, exercise great caution and care. When, therefore, a person about to cross a railroad track, under a given state of circustances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen.

"If this view be correct, it is plain as a general rule, that whether contributory negligence existed or not, is a mixed question of law and fact; that is to say, a fact for the jury to find from such testimony as the law regards as competent to prove it; and to be found in accordance with such rules as the court may give to the jury for their guidance."—*C. C. & G. R. R. Co. vs. Crawford, 24 Ohio St. 638-9. 1874.*

The facts were as follows:

Mr. and Mrs. Sipes and two children were in a farm wagon, and approaching the railroad track in daylight. An express train eight minutes behind time, going forty-five miles an hour, in the country, struck the wagon and killed Mr. and Mrs. Sipes. Sipes and his wife of course could not testify. But the court found that they did not see nor hear the approaching train until the horses were ten or fifteen feet from the track, then they could see; but they went across and the killing was the result. A verdict in behalf of the estates of the Sipes and wife was sustained.

The following is the Picksley case, 24 Ohio St. 954:

Picksley testified that he started from a grocery, where he had made some purchases, with a basket on his arm. The grocery was seventy-five feet from the track. He said when he started from the grocery he looked up the track of the railroad, but that he could neither see nor hear a train; that the railroad has a down grade toward the city; that he heard neither the ringing of the bell, nor the blowing of the whistle; that he could have heard if either had occurred.

He stated that he walked pretty fast and that he crossed from the grocery at his usual gait; that he did not hear the train coming; that it came down like a snake; that the street cars made considerable noise, and had on then the usual street car bells. *He also stated that he did not remember* looking for the cars after he left the grocery; that he may have looked again, but he does not recollect of doing so. When he got to the curb, he did not look up for the train, nor did he after he reached the curb; if he had done so he could have seen the train coming.

The Supreme Court, Judge White announcing the opinion said:

"Now applying this principle [law of negligence] to the case before us, if those in charge of the train had given the usual warning of its approach, in all probability the injury would have been avoided. So, too, notwithstanding their negligence, if the plaintiff, at the time he was about to step on the track, had looked in the direction of the coming train, he would doubtless have seen it and saved himself.

"We are, therefore, brought to the question, whether it was for the court, or for the jury, aided by proper instructions from the court, to finally decide whether the plaintiff, under the particular circumstances, was guilty of a want of ordinary care, in not seeing in time the approach of the train.

"The circumstances under which the plaintiff acted are sufficiently set forth in the statement of the case, and need not be here repeated. The question is whether they are of such a nature that the court would have been justified in withdrawing therefrom the consideration of the jury and in declaring the plaintiff, as a matter of law, guilty of contributory negligence. The circumstances of the present case, in our opinion, made it one to be passed upon by the jury under proper instruction."—*M. & C. R. R. Co. vs. Picksley*, 24, *O. S. 668.* (*1874.*)

"They could have fouud that he looked in both directions just before stepping on the track; that no object

was in sight from which danger could be apprehended, except this locomotive, then standing fifteen hundred feet distant on a side-track; that he knew, if the locomotive should come upon the main track and follow after him he would not thereby be endangered, unless the crew in charge of it should be grossly negligent; for he would be in plain view of them, at a place where switching was not uncommon, and men, therefore, might be expected to be on the tracks; all of which made their duty to maintain a constant outlook, clear and urgent; that he would only remain on the track a few minutes, and was in the performance of a duty requiring his attention. We think the question, whether under these circumstances, his failure to anticipate such gross negligence, by omitting to look behind him for the locomotive, was or was not negligent, fell within the proviuce of the jury, and was therefore rightfully submitted to them for determination."—*Railroad Co. vs. Margrat, 31 Law Bulletin, 249.* (*Supreme Court of Ohio.*) *51 Ohio St.*

"A plaintiff's right of recovery cannot be defeated in such case, unless he has been in *fault*, and he cannot be in any degree in fault if he bas exercised ordinary care. If the degree of neglect be less than ordinary neglect, it creates no legal fault. 'The plaintiff's right to recovery is not effected by his having contributed to the injury, unless he was in *fault* in so doing.' Sherman & Red. Neg. Sec. 27. 'Where the negligence of the plaintiff is relied on to defeat his recovery, he must have been guilty of at least *ordinary* negligence. His failure to take *great* care is no defense to the action.' Id. 29, Sec. 29, and note 3, where many cases are referred to."—*Strader & Co. vs. Cin. & Marietta R. R. Co., 2 Cincinnati Superior Court Rep. 277.* (*1871.*)

"In Kerwhacker vs. C. C. & C. R. R. Co., 3 Ohio St. 195, the following is laid down: 'That the general rule is, that where the parties are mutually in fault, or, in other words, where negligence of the *same nature* in each party has co-operated to produce the injury, the party sustaining the loss is without remedy, but that this rule is subject to the following qualifications: 1 The injured party, although in the fault to some extent, at the same time may, notwithstanding this, be entitled to reparation

in damages for an injury which could not have been avoided by ordinary care on his part.'"—*Pendleton St. R. R. Co. vs. Stallman, 22 Ohio St. 20. (1871.)*

I contend, then, that if this court should hold that it has jurisdiction, then, that there is no error in the record, and the judgment of the Circuit Court should be affirmed.

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